Supreme Court, U.S.
FILED
JUN 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-2059

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal Corporations,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WHITNEY NORTH SEYMOUR
WILLIAM J. MANNING
Counsel for Petitioners
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Of Counsel:

SIMPSON THACHER & BARTLETT
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

LIVINGSTON, DILDINE, HAYNIE & YODER
425 Lincoln Bank Tower
Fort Wayne, Indiana 46802
(219) 423-9411

June 27, 1980

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions Involved	6
Statement of the Case	6
A. Statement of Facts	7
B. History of the Case	9
Reasons for Granting the Writ	12
I—The denial of First Amendment protection to non-sham rate relief petitions warrants correction by this Court	16
II—The "overcharge" theory of antitrust liability newly created by the court below conflicts with the rate-making process under the Federal Power Act	20
III—The "price squeeze" theory adopted below exceeds the Sherman Act jurisdiction of the federal courts	25
IV—The Seventh Circuit's award of treble damages for litigation expenses before the Federal Commission contravenes the "American Rule" that attorney's fees are not recoverable absent an explicit statutory provision	29
Conclusion	30

INDEX TO SEPARATE APPENDIX

	PAGE
Text of Constitutional Provision Relied On	1a
Text of Statutes Relied On	1a
Order and Judgment of the Court of Appeals (February 21, 1980)	5a
Opinion of the Court of Appeals (February 21, 1980)	6a
Order on Petition for Rehearing	38a
Judgment	40a
Judgment Order of District Court	42a
Memorandum Opinion of the District Court (January 30, 1979)	47a
Findings of Fact and Conclusions of Law	105a
Order and Judgment of the Court of Appeals (August 16, 1977)	156a
Opinion of the Court of Appeals (August 17, 1977)	157a
Order and Memorandum of the District Court (May 1, 1975)	179a
Order of the District Court (October 22, 1976)	200a
Stipulation of Facts	201a

TABLE OF AUTHORITIES

PAGE

Cases:

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 6, 29
Arrow Transportation Co. v. *Southern Railway Co.*, 372 U.S. 658 (1963) 20, 24
Atlantic Refining Co. v. *Public Service Commission*, 360 U.S. 378 (1959) 22

Bluefield Water Works & Improvement Co. v. *Public Service Commission*, 262 U.S. 679 (1923) 24
Borough of Ellwood City v. *Pennsylvania Power Co.*, Civ. No. 77-145 (W.D. Pa.) 12
Borough of Lansdale v. *Philadelphia Electric Co.*, Civ. No. 78-2533 (E.D. Pa.) 12

California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 16, 17, 18
California Retail Liquor Dealers Association v. *Midcal Aluminum, Inc.*, 100 S.Ct. 937 (1980) 27
Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 28
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976) 24
Central Hudson Gas & Electric Corp. v. *Public Service Commission*, 48 U.S.L.W. 4783 (June 20, 1980) 19
Cities and Villages of Plymouth v. *Wisconsin Power & Light Co.*, Civ. No. 77-C-223 (W.D. Wis.) 12
Cities of Anaheim v. *Southern California Edison Co.*, Civ. No. CV-78-810-MML (C.D. Cal.) 12
City of Anderson v. *Indiana & Michigan Electric Co.*, Civ. No. F79-0043 (N.D. Ind.) 12
City of Batavia v. *Commonwealth Edison Co.*, Civ. No. 76-C-4388 (N.D. Ill.) 12
City of Cleveland v. *FPC*, 525 F.2d 845 (D.C. Cir. 1976) 22
City of Groton v. *Connecticut Light & Power Co.*, Civ. No. 15,609 (D. Conn.) 12

PAGE

City of Kirkwood v. *Union Electric Co.*, Civ. No. 77-0947-C(2) (E.D. Mo.) 12
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) 27
City of Mishawaka v. *American Electric Power Company, Inc.*, 616 F.2d 976 (7th Cir. 1980) ..... 2, 5, 8, 10, *passim*
City of Mishawaka v. *American Electric Power Company, Inc.*, 465 F. Supp. 1320 (N.D. Ind. 1979) 2
City of Mishawaka v. *American Electric Power Company, Inc.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978) 2, 9, 12, 25, 26
City of Mishawaka v. *American Electric Power Company, Inc.*, Civil Action No. S 74-72 (May 1, 1975) (N.D. Ind. 1975) 2
City of New Castle v. *Delmarva Power & Light Co.*, Civ. No. 77-296 (D. Del.) 12
City of Newark v. *Delmarva Power & Light Co.*, Civ. No. 77-254 (D. Del.) 12
City of Piqua v. *FERC*, 610 F.2d 950 (D.C. Cir. 1979) 22
Consolidated Edison Co. v. *Public Service Commission*, 48 U.S.L.W. 4776 (June 20, 1980) 19

East Tennessee Natural Gas Co. v. *FERC*, 20 F.P.S. 6-44 (D.C. Cir. 1980) 22
Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 16, 17, 18, 19

FPC v. *Conway Corp.*, 426 U.S. 271 (1976) 5, 13, 15, 19, 23, 24

Georgia v. *Pennsylvania Railroad*, 324 U.S. 439 (1945) 22
Gordon v. *New York Stock Exchange*, 422 U.S. 659 (1975) 3, 22, 23

PAGE

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 28
Hanrahan v. *Hampton*, 40 S.Ct. Bulletin (CCH) B2666 (June 2, 1980) 29

Kobe, Inc. v. *Dempsey Pump Co.*, 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952) 30

Mark Aero, Inc. v. *Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir. 1978) 17
Miracle Mile Associates v. *City of Rochester*, 617 F.2d 18 (2nd Cir. 1980) 17
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951) 20, 21

Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973) 3, 13, 15, 23

Parker v. *Brown*, 317 U.S. 341 (1943) 26

Roadway Express, Inc. v. *Piper*, 48 U.S.L.W. 4836 (June 23, 1980) 29

Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) 27
Subscription Television, Inc. v. *Southern California Theater Owners Association*, 576 F.2d 230 (9th Cir. 1978) 17

Texas & Pacific Railway Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 22
T.I.M.E., Inc. v. *United States*, 359 U.S. 464 (1959) 22

United Gas Pipe Line Co. v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958) 22
United Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 16, 17, 18, 19

PAGE

United States v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956) 13–14
United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964) 9
United States v. *Grinnell Corp.*, 384 U.S. 563 (1966) 13
United States v. *National Association of Securities Dealers*, 422 U.S. 694 (1975) 3, 22, 23
Utility Users League v. *FPC*, 394 F.2d 16 (7th Cir.), *cert. denied*, 393 U.S. 953 (1968) 14

Webb v. *Utah Tour Brokers Association*, 568 F.2d 670 (10th Cir. 1977) 17

Statutes and Regulations:

Clayton Act
Section 4, 15 U.S.C. §15 (1976) 6
Section 16, 15 U.S.C. §26 (1976) 6

Federal Communications Act
47 U.S.C. §204(a) (1976) 28

Federal Power Act
Section 205, 16 U.S.C. §824d (1976 and Supp. II 1978) 6, 16, 21
Section 206, 16 U.S.C. §824e (1976) 6, 21
Section 314, 16 U.S.C. §824m (1976) 28

Indiana Code Annotated (Burns 1973)
Section 8-1-2-94 14

Natural Gas Act
15 U.S.C. §717(c) (1976) 21

Public Utilities Regulatory Policies Act of 1978
Public Law No. 95-617, 92 Stat. 3117 (1978)
Section 206(a), 92 Stat. 3141 29
Section 207(b)(2), 92 Stat. 3142 19

PAGE

Revised Interstate Commerce Act of 1978
49 U.S.C.A. §10708(b) 21

28 U.S.C. §1254(1) 2

Miscellaneous Material:

Brief for the United States as Amicus Curiae, *Indiana & Michigan Electric Co.* v. *City of Mishawaka*, U.S. Supreme Court Docket No. 77-689 26

FERC Docket No. RM79-64 28

H.R. 8444, 95th Congress, 1st Session, Section 543 (1977) 19

IN THE

Supreme Court of the United States

October Term, 1979

No.

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal Corporations,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners American Electric Power Company, Inc., American Electric Power Service Corporation, and Indiana & Michigan Electric Company respectfully pray that a Writ of Certiorari issue to review the Order and Judgment of the United States Court of Appeals for the Seventh Circuit entered in this action on February 21, 1980, and to review the Order and Judgment of the United States Court of Appeals for the Seventh Circuit entered at an earlier stage of this action on August 16, 1977.

Opinions Below

The February 21, 1980 Opinion of the Court of Appeals, 616 F.2d 976 (7th Cir. 1980) (*"Mishawaka II"*), is reproduced in the Appendix at 6a-37a. The January 30, 1979 Memorandum Opinion of the District Court, 465 F. Supp. 1320 (D. Ind. 1979), is reproduced at 47a-104a.

The August 16, 1977 Opinion of the Court of Appeals, 560 F.2d 1314 (7th Cir. 1977), *cert. denied,* 436 U.S. 922 (1978) (*"Mishawaka I"*), is reproduced at 157a-178a. The unreported Memorandum Opinion of the District Court issued May 1, 1975 is reproduced at 180a-199a.

Jurisdiction

The Order and Judgment of the Court of Appeals were filed on February 21, 1980. Petitioners' timely application for rehearing and suggestion for in banc consideration was denied on March 31, 1980. This Petition for a Writ of Certiorari is filed within 90 days of March 31, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Does not the First Amendment right of petition under the *Noerr-Pennington* doctrine preclude the imposition of Sherman Act liability where such liability is predicated, in whole or in part, upon petitions for rate relief to the Federal Energy Regulatory Commission (the "Federal Commission") and where it has been found that the petitions for rate relief sought no more than the utility believed it could justify under the applicable statutes and regulations and were, therefore, not sham?

2. In light of this Court's decisions in cases such as *Gordon, National Association of Securities Dealers* and *Otter Tail,** does not the pervasive regulation of electric utility rates under the Federal Power Act confer exclusive jurisdiction over those rates upon the Federal Commission, and effect an implied repeal of the antitrust laws to the extent that the level and collection of those rates are the foundation of the antitrust claims?

3. Where, under the Federal Power Act, an electric utility files a petition for rate relief and collects the requested rate during the pendency of the federal rate-making proceedings subject to the Federal Commission's power to order a refund with interest:

   A. Is not the statutory refund under the Federal Power Act the exclusive remedy for any difference between the rate requested (and collected subject to refund) and the rate ultimately found to be just and reasonable by the Federal Commission?

---

* *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975); *United States* v. *National Ass'n of Securities Dealers, Inc.,* 422 U.S. 694 (1975); *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973).

B. Did not the court below err in holding that the amount of any statutory refund (or the district court's estimate thereof) is a "monopolistic overcharge" giving rise to liability under Section 2 of the Sherman Act?

C. May a federal court predicate antitrust injury on the assumption that there will be such a "monopolistic overcharge", prior to a determination of the just and reasonable rate by the Federal Commission in the regulatory proceeding?

D. Does not judicial interference in the rate-making process alter the congressionally determined balance between the interest of the customer in a just and reasonable rate and the interest of the public in the financial stability of public utilities?

4. May an electric utility which is subject both to federal regulation over the rates it charges municipal distribution systems, and to independent and inconsistent state regulation over the rates it charges its industrial customers, be held liable under Section 2 of the Sherman Act for creating a "price squeeze" between such rates, where:

A. In accordance with the Federal Power Act, the federal rate was collected, subject to refund, following the filing of petitions for such rates, which were supported by cost-of-service studies and which, as the antitrust court found, sought rates no higher than the utility believed it could justify under the applicable statutes and regulations;

B. It has been found that there was "no suggestion" that the utility had artifically depressed its state-regulated rates to create any "price squeeze";

C. It has been found not only that the difference between the federally-regulated and state-regulated rates was substantially attributable to the action of the State Commissions in reducing the rates sought by the utility, but also that the federal and state regulatory schemes are so diverse and inconsistent that any expectation of parity between the resulting rates is "totally without foundation";

D. At the time the antitrust court entered its judgment of liability, the Federal Commission had not yet determined either (i) the extent, if any, to which the federal rate collected subject to refund exceeded the just and reasonable rate or (ii) the validity of the "price squeeze" allegations raised in the federal regulatory proceeding?

5. Does not the "state action" doctrine protect an electric utility from "price squeeze" liability under Section 2 of the Sherman Act where it has been found that the difference between its federally-regulated rates and its state-regulated rates was attributable to the action of state agencies in reducing the rates sought by the utility and to the inconsistent bases on which the federal and state rates are determined?

6. Did not the Seventh Circuit's opinion in *Mishawaka II* erroneously construe Section 205 of the Federal Power Act and this Court's opinion in *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976), as:

A. Authorizing the federal courts in antitrust litigation to speculate as to how the Federal Commission may ultimately exercise its jurisdiction to determine the level of rates and to rule upon "price squeeze" allegations; and

B. Imposing a prior restraint on utilities to limit their applications for federal rate increases to the level of rates previously allowed by state agencies, thus inhibiting the freedom of a utility to petition for the rates it believes it can justify and at the same time frustrating the Federal Commission's exercise of jurisdiction over federal rate levels and price squeeze allegations?

7. Does not *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), preclude the allowance as antitrust treble damages of litigation fees incurred by a party in bringing an undecided federal regulatory proceeding?

Constitutional and Statutory Provisions Involved

This petition raises issues which require an accommodation among (i) the First Amendment to the United States Constitution, (ii) Section 2 of the Sherman Act, 15 U.S.C. §2 (1976), and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15, 26 (1976), and (iii) Sections 205 and 206(a) of the Federal Power Act, 16 U.S.C. §§824d (1976 and Supp. II 1978), 824e(a) (1976). These authorities are set forth in the Appendix hereto at 1a through 4a.

Statement of the Case

The jurisdiction of the district court was invoked under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15, 26 (1976), for alleged violations of Section 2 of the Sherman Act, 15 U.S.C. §2 (1976).

A. Statement of Facts*

Indiana & Michigan Electric Company ("I&M") generates, transmits and sells electricity to industrial, commercial and residential customers, as well as to customers such as the respondent municipal electric distributors ("Municipalities") who resell electricity to ultimate users in their communities.** 202a-203a. The ten Municipalities purchase their electricity from I&M. 202a.

The electric rates charged by I&M are subject to regulation in three separate jurisdictions. 204a. I&M's rates to the Municipalities are regulated by the Federal Commission under the Federal Power Act. 204a. I&M's rates to its consumer customers are regulated under state law by the public service commissions of Michigan and Indiana (the "State Commissions"). 204a.

I&M may not charge any customer rates different from those reflected in its effective tariffs on file with the Federal or State Commissions (206a), and may not change its rates to any customer without filing a petition with the appropriate commission (205a). Congress provided that rate increases filed with the Federal Commission become effective not later than six (now seven) months after filing, subject to a refund, with interest, of any por-

* The facts set forth here are drawn exclusively from the Stipulation of Facts admitted in evidence by the trial court (and included in the Appendix to this Petition at 201a-319a) and from the findings and opinions rendered below.

** I&M is a subsidiary of Petitioner American Electric Power Company, Inc. ("AEP"), a public utility holding company. 203a. Petitioner American Electric Power Service Corporation, also an AEP subsidiary, provides management, professional and technical services to its parent, to I&M and to the other electric operating company subsidiaries of AEP. 203a.

tion of the rate sought which exceeds the rate found by the Federal Commission to be "just and reasonable." 205a-206a. I&M's state-regulated rates, however, do not become effective until after the State Commissions issue orders setting the levels of such rates. 206a.

I&M filed its first petition for a federal rate increase in 1972; its second in May 1976; and its third in May 1978. 211a. Each federal petition was preceded by at least one petition for rate relief in each state. 211a.

The federal proceeding arising out of the 1972 rate petition was settled among the parties in 1977, prior to any ruling by the Federal Commission. 217a. The federal proceeding arising out of the 1976 rate petition was pending before the Federal Commission at the time of the Court of Appeals decision in *Mishawaka II*. 11a. (On March 18, 1980, *after* the Court of Appeals decision in *Mishawaka II,* the Federal Commission determined the just and reasonable rate in the 1976 proceeding, but has yet to determine the "price squeeze" issues raised in that proceeding.) The proceeding arising out of the 1978 rate petition is still pending. 11a. Thus, at the time *Mishawaka II* was decided, the Federal Commission had not rendered a decision on the merits of any of I&M's petitions for rate increases.

There was no evidence, and there has been no finding, that I&M manipulated any of its rate filings. To the contrary, the district court found (120a) and the Court of Appeals affirmed (13a) that I&M's federal rate petitions sought the maximum rate relief that I&M believed it could justify under the applicable rules and regulations, and

that its petitions for rate increases were therefore not sham (13a). The Court of Appeals also found that there was "no suggestion" that I&M had artificially depressed its state-regulated petitions so as to create a "price squeeze" between federal and state regulated rates. 28a n.16.

B. History of the Case

In 1974, I&M moved on jurisdictional grounds for dismissal of the first of the several complaints subsequently consolidated in this action. That complaint alleged that the Municipalities could not compete with I&M for industrial customers because I&M had created a "price squeeze" between its federally-regulated rate charged to the Municipalities and its state-regulated rates to its industrial customers. After the district court's denial of that motion was affirmed by the Seventh Circuit in *Mishawaka I*, I&M petitioned this Court for a Writ of Certiorari. At the request of the Court, the Solicitor General presented the separate views of the Federal Commission and of the United States in a brief *amicus curiae*. That Petition, addressed solely to the pleadings, was denied on May 22, 1978. 436 U.S. 922 (1978).

This action went to trial in November 1978 under an amended and consolidated complaint. The district court rendered its Opinion, Findings and Conclusions on January 30, 1979.* The district court found a violation of Sec-

* The district court's Findings of Fact and Conclusions of Law were copied (in large measure, photocopied) from the proposed findings and conclusions submitted by counsel for the Municipalities. With some excisions and a handful of changes, the district court's opinion was a *verbatim* reprint of the post-trial brief submitted by counsel for the Municipalities. *See United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 n.4 (1964).

tion 2 of the Sherman Act, awarded treble damages in excess of $12 million and imposed injunctive relief. *Mishawaka II* affirmed the finding of Section 2 liability against Petitioners, explicitly relying upon the amalgamation of three activities, while conceding that no one of the activities would in itself have constituted a violation of Section 2. 24a. The activities on which the Seventh Circuit relied, each of which was subject to regulation, are:

1. I&M's filing of federal rate petitions. I&M was found to have collected "monopolistic overcharges" and to have charged federal rates that were higher (prior to any refund) than its state rates.

2. I&M's proposal of a curtailment plan during a 1974-75 shortage of generating capacity and its expressed desire at that time to withdraw ultimately from the market for the bulk sale of electricity.

3. I&M's acquisition of four municipal electric distribution systems between 1957 and 1966, prior to any of the acts by which the Municipalities claim to have been injured, and its lease of the Fort Wayne municipal electric distribution system in 1975.

There is no dispute that each of these activities is subject to regulation. I&M's federal rates are collected subject to refund pending the Federal Commission's determination of a just and reasonable rate that reflects, among other things, the relationship between federal and state rates. 206a. Any curtailment of service by I&M or withdrawal from the market for bulk sales would have required

prior approval of the Federal Commission. 22a. 18 C.F.R. §35.15 (1979). (It is not claimed that I&M made any application to withdraw service from the Municipalities; it is stipulated [248a] that I&M has never interrupted service to any of them.) Finally, each of the acquisitions and the lease transaction was approved by the voters of the affected municipality and each was determined by the appropriate regulatory agency to have been in the public interest. 23a.

Having affirmed on liability, the Seventh Circuit reversed and remanded the case to give the Municipalities a further opportunity to "establish their antitrust damages by proof of specific injuries they have suffered as a result of [I&M's] overcharges and other monopolistic practices" (30a), although the Municipalities have consistently argued that they cannot show damages in that fashion (25a, 249a-250a) and made no attempt to do so at trial.

The Seventh Circuit also directed the district court on remand to include as an item of treble damages the "expenses [the Municipalities] incurred in litigating" an unresolved Federal Commission proceeding commenced by them to press claims which are identical to the curtailment and "attempted withdrawal" claims asserted in this federal antitrust action. 31a. The Seventh Circuit also vacated and remanded the injunctions entered by the district court. 37a.

Mishawaka II is thus dispositive on liability and that controlling issue is now ripe for review by this Court.

Reasons for Granting the Writ

Mishawaka I and *Mishawaka II* are the first federal appellate court opinions to consider the application of Section 2 of the Sherman Act, in a federal court action, to the pervasively regulated rates charged by an electric utility. Numerous similar cases, alleging a "price squeeze" between a utility's federal and state regulated rates, are pending in district courts throughout the country;* a host of such allegations are before the Federal Commission.

The decisions below posited liability under the antitrust laws upon actions taken by a utility to invoke the regulatory jurisdiction of the Federal and State Commissions over its rates, notwithstanding that the utility's filings were not sham. Such an expansive construction of the antitrust laws subverts the regulatory scheme which Congress adopted in the Federal Power Act. It overturns principles of substantive antitrust law and federal antitrust jurisdiction which have been carefully developed by the Congress and by this Court. It erodes constitutional rights

* There are at least 10 other actions, presently pending in the district courts, which raise "price squeeze" in the electric utility industry as an element of the Sherman Act claims: *City of Groton* v. *Connecticut Light & Power Co.*, Civ. No. 15,609 (D. Conn.); *City of Batavia* v. *Commonwealth Edison Co.*, Civ. No. 76-C-4388 (N.D. Ill.); *Cities and Villages of Plymouth* v. *Wisconsin Power & Light Co.*, Civ. No. 77-C-223 (W.D. Wis.); *City of Newark* v. *Delmarva Power & Light Co.*, Civ. No. 77-254 (D. Del.); *City of New Castle* v. *Delmarva Power & Light Co.*, Civ. No. 77-296 (D. Del.); *City of Kirkwood* v. *Union Electric Co.*, Civ. No. 77-0947-C (2) (E.D. Mo.); *Borough of Ellwood City* v. *Pennsylvania Power Co.*, Civ. No. 77-145 (W.D. Pa.); *Cities of Anaheim* v. *Southern California Edison Co.*, Civ. No. CV-78-810-MML (C.D. Cal.); *Borough of Lansdale* v. *Philadelphia Electric Co.*, Civ. No. 78-2533 (E.D. Pa.); *City of Anderson* v. *Indiana & Michigan Electric Co.*, Civ. No. F79-0043 (N.D. Ind.).

and at the same time creates a conflict between federal regulatory law and the federal antitrust laws.

We need not question this Court's holding in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), that electric utilities are generally subject to the antitrust laws. Indeed we rely in part upon that portion of *Otter Tail* which holds that, while a utility may be compelled under the antitrust laws to make its power lines available to municipal utility systems, it is the Federal Commission which has jurisdiction to determine the rates to be charged for such service. 410 U.S. at 375-77. We rely as well upon this Court's related holding, in *FPC* v. *Conway Corp.,* 426 U.S. 271 (1976), that the Federal Commission has jurisdiction to consider antitrust principles, and must do so in its rate making activities, when allegations are made of a "price squeeze" between federal and state rates.

One of the fundamental questions which this case raises is whether a federal court exercising antitrust jurisdiction may involve itself in a determination of the appropriateness of a utility's rates, in view of the Federal Commission's jurisdiction over the level of those rates and over "price squeeze" allegations.

Fundamental also is the question of the extent to which the usual principles of antitrust law may properly be applied in a Section 2 case when the violation alleged arises from a utility's regulated rates. The well-known indicium of "[m]onopoly power is the power to control prices or exclude competition." *United States* v. *Grinnell Corp.,* 384 U.S. 563, 571 (1966), quoting *United States* v. *E. I.*

du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). It should be clear beyond cavil that regulation of a utility's rates precludes the possibility that it has the power to control price within the usual antitrust meaning of those words. And it is equally true that, by reason of federal and state regulation, I&M cannot be said to have the power to exclude competitors in the usual sense. (Indeed it is the Municipalities which have the power to exclude I&M from serving ultimate customers within or near their boundaries.*) That at least some special care and caution should be taken in applying antitrust principles to the electric utility industry was recognized in *Utility Users League* v. *FPC*, 394 F.2d 16 (7th Cir.), *cert. denied*, 393 U.S. 953 (1968), which described the industry as one in which "restraints on competition are not only tolerated, but encouraged." *Id.* at 19.

The court below acknowledged that there "is some substance to [I&M's] regulatory argument" (18a); that it is "the diverse [federal and state] regulatory procedures which preclude parity between wholesale and retail rates" (18a); that any utility subject to dual regulation "may find itself in a legal and practical maze" (18a); and that its resolution of the case did "not render a totally satisfying result" (8a).

But what the court below failed to recognize is that the nature of a regulated "monopoly" calls for a narrower rather than a broader application of the antitrust laws and that a utility should be entitled *a fortiori* to the protection

* Any Indiana municipality which wishes to expand the area served by its utility or to take over service to any I&M customers within its boundaries has statutory power to do so by condemning I&M's utility property serving those customers. Ind. Code Ann. §8-1-2-94 (Burns 1973).

of the *Noerr-Pennington* and "state action" doctrines with respect to its rate petitions. The court below equally failed to recognize that *Otter Tail* and *Conway,* far from mandating antitrust liability for a perceived violation of the Federal Power Act, preclude the ritual application of antitrust principles to disputes involving regulated rates. The Seventh Circuit's expansive view of the application of the antitrust laws to the rates of the regulated electric utility industry led inexorably to its failure to perceive that the congressionally mandated remedy of refund must be considered an exclusive remedy in a dispute involving the appropriateness of the federal rate. The use of the Sherman Act to accomplish rate reductions by indirection is an unwarranted interference with the policy of the Federal Power Act, which assigns to the Federal Commission exclusive jurisdiction to set just and reasonable rates.

The argument that follows demonstrates that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned a departure by the district courts which will consider numerous similar pending cases, as to call for the exercise of this Court's power of supervision.

I

The denial of First Amendment protection to non-sham rate relief petitions warrants correction by this Court.

The filing of a petition constitutes the sole avenue designated by Congress for an electric utility to obtain rate relief. Federal Power Act §205(d), 16 U.S.C. §824d(d) (Supp. II 1978). This Court held in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), that petitions to government are insulated by the First Amendment from antitrust attack, regardless of their purpose or intent. The sole exceptions are "mere sham" petitions, defined as those which (a) do not reflect a "genuine" effort to obtain the relief sought *and* (b) are intended instead to injure competitors directly.*

Mishawaka II recognizes that I&M's rate petitions were not "sham":

> *The "mere sham" exception standing alone does not apply to this case.* The trial court did not find that the federal tariff filings were "mere sham," but found instead that the utility filed for *the highest rate it thought it could justify* without any regard for the adverse competitive impact the new wholesale rate would have . . . .

13a (emphasis added). That conclusion, we submit, should have ended the inquiry and mandated dismissal of the "price squeeze" and "overcharge" claims. The finding

---

* *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight Inc.*, 365 U.S. 127, 144 (1961); *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 511-15 (1972).

that I&M sought only the rate levels it believed it could justify precludes any determination that the filings were not genuine efforts to influence government. *See Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. at 144. Similarly, the finding that I&M's rate petitions were made without regard to anticompetitive considerations precludes any determination that the filings were made for the purpose of directly inflicting injury on competitors. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512 (1972). The several Courts of Appeals have routinely applied that two-pronged test.*

Nevertheless, *Mishawaka II* asserts that I&M's petitions, although not sham, may be amalgamated with other acts to create an antitrust violation.** A jury charge to that precise effect was expressly held by this Court to be reversible error:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, *either standing alone or as part of a broader scheme itself violative of the Sherman Act.*

United Mine Workers v. *Pennington*, 381 U.S. at 670 (emphasis added).

A second ground offered in *Mishawaka II* for denying *Noerr-Pennington* protection to I&M's rate filings is the

---

* *E.g., Miracle Mile Assocs.* v. *City of Rochester*, 617 F.2d 18, 20-21 (2d Cir. 1980); *Mark Aero, Inc.* v. *Trans World Airlines, Inc.*, 580 F.2d 288, 295, 297 (8th Cir. 1978); *Subscription Television, Inc.* v. *Southern California Theatre Owners Ass'n*, 576 F.2d 230, 233 (9th Cir. 1978); *Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d 670, 674 (10th Cir. 1977).

** "Considering the *combination of those utility activities* this case is not precluded by *Noerr-Pennington*." 17a (emphasis added).

theory that, by filing its 1976 petition before the Federal Commission had ruled on its 1972 petition, and by filing its 1978 petition before the Federal Commission had ruled on its 1976 petition, I&M was making "baseless, repetitive" claims which denied the Municipalities meaningful access to the Federal Commission, within the meaning of *California Motor Transport*. 16a. That case (which established the principle that the *Noerr-Pennington* doctrine is applicable to administrative petitions) held that the assertion of "baseless, repetitive" claims, instituted " 'with or without probable cause, and regardless of the merits of the cases' " as "pretexts" to injure competitors directly, may be sham activity outside the protection of the First Amendment. 404 U.S. at 512-15.

The 1976 and 1978 filings cannot, however, be "repetitive" acts constituting abuse of the administrative process within the meaning of *California Motor Transport* or in any other sense, since (a) I&M has sought only three rate increases during the twelve inflation-ridden years in which its rates to the Municipalities have been federally regulated; (b) it is not claimed, and cannot be claimed, that I&M was in any way responsible for the long delay encountered in the regulatory proceedings; (c) it has been found that I&M's filings were not sham; and (d) far from being meritless "pretexts" for inflicting anticompetitive injury, it has been found that I&M's filings sought no more than I&M believed it could justify. By stripping I&M of its First Amendment right to petition on the ground that its rate petitions were "repetitive," the Seventh Circuit has imposed a judicial requirement that Congress has declined to adopt, and has limited the permissible frequency of filings in a manner more stringent than Congress has even considered.

In 1977, Congress rejected an amendment to the Federal Power Act which would have required the Federal Commission to act on rate increase filings within ten months, during which time the filing utility would not have been permitted to seek additional rate relief. H.R. 8444, 95th Cong., 1st Sess. §543 (1977). *Cf.* Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617 §207(b)(2), 92 Stat. 3142 (1978). The Seventh Circuit thus premised antitrust liability and denial of *Noerr-Pennington* protection on a sequence of rate petitions that were and would have remained permissible even under the amendment that Congress declined to enact.

With respect to the "price squeeze" claims, the Seventh Circuit declined to apply the *Noerr-Pennington* doctrine on the additional ground that I&M's rate petitions had violated Section 205 of the Federal Power Act under the Seventh Circuit's interpretation of *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976). 15a-16a. That interpretation, with which we disagree (*see* pp. 27-28 *infra*), does not provide a ground for denying *Noerr-Pennington* protection. In *Noerr*, this Court held that, so long as petitions are genuinely intended to influence government, they are protected by the First Amendment, even though the petitions are "vicious, corrupt and fraudulent" and made solely for anticompetitive purposes. 365 U.S. at 138-40. The result in *Mishawaka II* contravenes the First Amendment without serving the antitrust laws. It is of extreme importance to all regulated electric utilities that this Court announce that *Noerr-Pennington* is as applicable to their petitions for rate relief as it is to the petitions to government of all other citizens. *Cf. Consolidated Edison Co.* v. *Public Service Commission*, 48 U.S.L.W. 4776 (June 20, 1980); *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 48 U.S.L.W. 4783 (June 20, 1980).

II

The "overcharge" theory of antitrust liability newly created by the court below conflicts with the rate-making process under the Federal Power Act.

Mishawaka II proceeds on the theory that whenever the Federal Commission sets the just and reasonable rate at a level below the rate sought and collected subject to refund, the difference is a "monopolistic overcharge." 27a. Moreover, the antitrust court need not wait for the Federal Commission to set the "just and reasonable" rate, but may "estimate" what that rate might turn out to be. 28a.

Under time-honored principles of administrative law, the "just and reasonable" rate cannot be used as a standard for determining the existence of a "monopolistic overcharge" under the antitrust laws. "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint"; it is a rate-making concept cognizable only in its regulatory context. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). Accordingly, "[j]udicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review." *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 670 (1963). It is well-settled that:

> [A party] cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise

> of the Commission's judgment, in which there is some considerable element of discretion. *It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission,* and not even a court can authorize commerce in the commodity on other terms.

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. at 251 (emphasis added).

The "monopolistic overcharge" theory announced in *Mishawaka II* would cast a wide net. Numerous federal regulatory statutes provide for proposed rates to be collected subject to refund.* The theory of liability fashioned by the Seventh Circuit threatens all such regulatory schemes.

Specifically, *Mishawaka II* disrupts the regulatory balance of the Federal Power Act by effecting a drastic redistribution of the burdens allocated by Congress between the electric utility and its customers. The Federal Power Act provides that proposed rates become effective after specified periods of notice and suspension. Federal Power Act §205(d), (e); 16 U.S.C. §824d(d) (Supp. II 1978), 16 U.S.C. §824d(e) (1976). If the Federal Commission does not approve the full amount of the proposed rate, the remedy prescribed by Congress is a refund with interest. Federal Power Act §205(e); 16 U.S.C. §824d(e) (1976). That scheme reflects a purposeful balancing of interests by Congress between the customer's private interest in paying just and reasonable rates and the public interest

* *E.g.*, 49 U.S.C.A. §10708(b) (Supp. 1979) (Revised Interstate Commerce Act of 1978); 15 U.S.C. §717(c) (1976) (Natural Gas Act); 47 U.S.C. §204(a) (1976) (Federal Communications Act).

in the financial soundness of public utilities. *See United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103, 113-14 (1958) (Natural Gas Act); *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378, 392 (1959) (Natural Gas Act); *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464, 479-80 (1959) (Motor Carrier Act).

Sound rate regulation depends upon the initiative of utilities in seeking timely and adequate rate relief. *See Georgia* v. *Pennsylvania Railroad,* 324 U.S. 439, 459 (1945); *City of Cleveland* v. *FPC,* 525 F.2d 845, 855 (D.C. Cir. 1976). The Federal Commission cannot grant a rate higher than the rate proposed by the utility; a utility that petitions for a rate increase less than it believes to be its entitlement loses for all time the revenues it has foregone, because the Federal Commission lacks retroactive rate-making power. *East Tennessee Natural Gas Co.* v. *FERC,* 20 F.P.S. 6-44, 6-52 (D.C. Cir. 1980); *City of Piqua* v. *FERC,* 610 F.2d 950, 954 (D.C. Cir. 1979). The decisions below thus create a sharp and irreconcilable conflict between the Sherman Act and the federal rate-making scheme by upsetting the balance of interests created by Congress in the Federal Power Act. That repugnancy between the Federal Power Act and court-ordered rate-making under the Sherman Act effects an implied repeal of the Sherman Act. *See Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975); *United States* v. *National Association of Securities Dealers,* 422 U.S. 694 (1975). *Cf. Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, 436-37 (1907).

The Seventh Circuit has concluded that delay in the regulatory process leads to long periods of "unregulated"

rates during which the proposed rates are collected subject to refund (16a), and found in that circumstance a proper role for Sherman Act relief. The test of conflicting regulation, however, turns upon the existence of authority to regulate particular acts, not upon judicial approval of the efficiency with which that authority is administered. In *Gordon,* this Court held that the SEC's naked power over fixed rates on brokerage commissions was inconsistent with district court jurisdiction over the antitrust implications of those rates; an implied repeal of the Sherman Act was therefore required to make the regulatory system work. 422 U.S. at 685-86, 691. In *National Association of Securities Dealers,* this Court ruled that the SEC's regulatory authority over the fixed resale prices of certain securities "displaces" the federal antitrust laws, even though the SEC had never formulated any rule or regulation governing those prices. An implied repeal of the antitrust laws was deduced from the "substantial danger that appellees would [otherwise] be subjected to duplicative and inconsistent standards" (426 U.S. at 735), a "plain repugnancy" between the regulatory scheme and the application of the antitrust laws.

The error below that engenders the most far-reaching dislocation of the regulatory process is the implicit assumption that *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), and *FPC* v. *Conway Corp.,* 426 U.S. 271 (1976), mandated that the federal courts exercise antitrust jurisdiction over the rate petitions and regulated rates of electric utilities. To the contrary, we read those decisions as reflecting a careful avoidance of any interference with the

Federal Commission's jurisdiction over rates. *Conway* directed the Federal Commission to "consider" price squeeze allegations, but affirmed the jurisdiction of that agency—not of the courts—to reduce federal rates, within the zone of reasonableness, in order to serve competitive ends.* 426 U.S. at 278-79. Even the Federal Commission may not require a rate below the zone of reasonableness, since that would be confiscatory and therefore unconstitutional. *Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U.S. 679, 690-95 (1923). The decision below thus permits the use of treble damages under the antitrust laws to effect by indirection that which cannot be done directly under the federal regulatory scheme.

The effectiveness of regulatory procedures requires that the demarcation of responsibility for rate-making be clear and sharp. *Cf. Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976) (utility's light-bulb exchange program not central to regulatory scheme). The Seventh Circuit has here crossed the line carefully marked by this Court; in the absence of any determination by the Federal Commission, the Seventh Circuit impermissibly authorized the district court, on remand, to "estimate" what the Federal Commission might determine the 1976-78 refund to be. 28a. *Cf. Arrow Transportation Co.* v. *Southern Railway Co.,* 372 U.S. 658, 671 (1963). The Federal Commission's decision on the 1976 rate case, issued shortly after *Mishawaka II,* represents an acid commentary on the conjectures that gov-

* The injunction upheld in *Otter Tail* explicitly provided that the utility "shall not be compelled" to provide transmission services "except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission." 410 U.S. at 375.

erned the liability findings in both courts below and highlights the necessity for corrective supervision by this Court.*

If allowed to stand, the decisions below will open the federal courts for the resolution of a whole new series of elaborate and burdensome problems, which have previously been properly considered to be within the province of legislatures and regulatory agencies. Existing federal and state regulatory legislation provides adequate enforcement mechanisms without the federal courts having to assume fresh, unaccustomed and extremely time-consuming burdens.

III

The "price squeeze" theory adopted below exceeds the Sherman Act jurisdiction of the federal courts.

Mishawaka I upheld subject matter jurisdiction on a "price squeeze," not an "overcharge," theory. The premise of *Mishawaka I* was that a utility could injure competitors paying a federal rate either by artificially inflating its federal rate petitions or by artificially depressing its state rate petitions. 165a-169a.

On a motion to dismiss, *Mishawaka I* failed to recognize the exclusivity of the statutory refund remedy and the constitutional right to a compensatory rate by holding that

* Computations based on the Federal Commission's post-*Mishawaka II* ruling in the 1976 rate case reflect that I&M will retain, as just and reasonable, over 96% of the charges collected during the 1976-78 damage period on which both courts focused below. (These computations were made after the Seventh Circuit denied rehearing.) It is inconceivable, we submit, that any utility can be required to predict the just and reasonable rate more accurately, at peril of antitrust liability. It is similarly inconceivable, we submit, that any utility should incur antitrust liability for a "monopolistic overcharge" if the Federal Commission were to disallow a proposed rate increase solely because of technical or legal grounds totally unrelated to competitive considerations.

Sherman Act *jurisdiction* may be required to remedy fully a "price squeeze" created by such rate manipulation. *Mishawaka II* went further and sustained "price squeeze" *liability* even though (a) there is no finding that I&M artificially inflated its federally-regulated rates, and (b) "[t]here is no suggestion that [I&M] deliberately depressed its [state-regulated] rates to create a price squeeze . . ." 28a n.16. Indeed, *Mishawaka II* further found that "a substantial portion of the disparity between [I&M's federal and state] rates apparently arises from the fact that the utility did not receive favorable consideration by the state commissions on several of its [state] rate filings." 28a n.16. Any remaining difference presumably arises from the inconsistent bases on which federal and state rates must be computed, inconsistencies which bar any assumption that those rates should be equal. 26a-27a, 18a.

Those findings should also have precluded liability under the state action principle enunciated in *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny. On I&M's petition for review of *Mishawaka I*, the Solicitor General observed that, "if the alleged price squeeze resulted solely from a state agency's reduction of the utility's proposed [state-regulated] retail rates, the squeeze might be attributable to state rather than private action." Amicus Brief at 14 n.5 (No. 77-689). As *Mishawaka II* concedes, the "[a]nticompetitive effects from [a substantial] portion of the price squeeze, absent evidence that [I&M] deliberately depressed its [state-regulated] retail rates, must be attributed to the state regulatory commissions and not to the utility." 28a n.16. Since the state action reducing I&M's proposed rates was taken pursuant to regulatory schemes that are "clearly articulated and affirmatively expressed as state policy," and "actively supervised" by the States

of Indiana and Michigan, any "price squeeze" created by the reduction in state rates is immune from antitrust attack. *See California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 100 S.Ct. 937, 943 (1980); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (Brennan, J., concurring).

Moreover, the only evidence at trial that a "price squeeze" ever existed was a schedule comparing billings under various federal and state rates, upon which the Municipalities relied to establish both "price squeeze" liability and damages. *Mishawaka II* vacated the damage award predicated on that schedule because the various rates utilized therein reflected "different accounting practices," "different formulae and criteria" for rate determination and "in all likelihood, . . . dissimilar fixed and variable cost requirements" (26a); the Seventh Circuit expressly recognized that the district court's assumption that such rates should have been "equivalent" was "totally without foundation" for damage computation purposes. 27a. That recognition should have mandated dismissal of the "price squeeze" claim, because liability as well as damages hinged on that same flawed evidence. Evidence insufficient even to support an award of antitrust damages cannot as a matter of law satisfy the more difficult burden of establishing antitrust liability. 25a. *See Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

Having found that I&M did not manipulate any of its petitions for rate relief, and having properly rejected the Municipalities' only evidence of a rate disparity, *Mishawaka II* in effect predicates "price squeeze" *liability* on the ground that I&M violated an implied obligation under the Federal Power Act to govern its federal rate filings by

the rates established by the State Commissions. 19a-20a. The antitrust court thus purports to amend the Federal Commission's filing requirements. Even the revised rate increase filing regulations adopted by the Federal Commission in May 1980 and effective later this year (FERC Docket No. RM79-64) do not reflect the alleged "obligation" of a utility to tailor federal rate filings to the cut of the state rates. The obligation that I&M is said to have breached was articulated for the first time in the district court's decision imposing Sherman Act liability.* This notion has now been adopted in *Mishawaka II,* which stands, unless reversed, as the sole federal appellate guide to electric utilities faced with the need to seek rate relief.

In that light, the Seventh Circuit's "price squeeze" and "overcharge" analyses emerge as no more than a vehicle for an impermissible judicial reduction in federally regulated electric rates by way of treble damages under the antitrust laws. That reduction would occur irrespective of the *bona fides* of the utilities' petitions for rate relief and of the roles of both the Federal and State Commissions in setting just and reasonable rates. The intervention of this Court is required to define the extent, if any, to which the Sherman Act is applicable to the rates of electric utilities caught in what *Mishawaka II* described as the "maze" of dual regulation. *See* 18a.

---

* The district court's ruling therefore represents an "avulsive change" in the law from which no liability should be held to arise. *See Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 499 (1968). By this change, the courts below have attempted to create a private right of action to enforce Section 205 of the Federal Power Act, by which individual customers may seek review in a federal district court of a utility's compliance with the Federal Power Act (*see* 13a-14a), using the Clayton Act's treble damage provision as an enforcement mechanism. Such a procedure is flatly contrary to the Act itself, which grants enforcement powers to the Federal Commission and to no one else. Federal Power Act §314(a), 16 U.S.C. §825m (1976). *See Cannon* v. *University of Chicago,* 441 U.S. 677, 690 n.13 (1979).

IV

The Seventh Circuit's award of treble damages for litigation expenses before the Federal Commission contravenes the "American Rule" that attorney's fees are not recoverable absent an explicit statutory provision.

The Seventh Circuit, reversing the district court, has remanded for a treble damage assessment the Municipalities' litigation expenses in a proceeding they commenced before the Federal Commission. 31a-32a. In that proceeding, the Municipalities challenged I&M's curtailment plans and its refusal to renew their long-term, full-requirements contracts (though offering to continue service) during a period in which I&M was experiencing a shortage of generating capacity. The Federal Commission has not decided that controversy, and Congress has subsequently enacted legislation specifically covering such a situation. Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617 §206(a), 92 Stat. 3141 (1978).

Apart from the manifest impropriety of awarding litigation expenses (let alone trebling them) in an undecided case (*see Hanrahan* v. *Hampton,* 40 S.Ct. Bull. [CCH] B2666 [June 2, 1980]), the Seventh Circuit's decision is in derogation of the American Rule on attorney's fees, as reaffirmed in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). *See Roadway Express, Inc.* v. *Piper,* 48 U.S.L.W. 4836 (June 23, 1980). Absent specific statutory provisions permitting an award of attorney's fees, Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs *or otherwise* whenever the courts might deem them warranted." 421 U.S. at 260 (emphasis added).

The federal courts have generally followed that principle in antitrust cases, except for *defensive* litigation expenses that have been awarded as antitrust damages in the unique patent-antitrust context. *See, e.g., Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952). The Seventh Circuit's determination, which permits a party to establish antitrust injury and damages solely on the basis of litigation expenses voluntarily incurred in bringing administrative proceedings, represents an unwarranted departure from the American Rule and creates a dangerous treble-damages incentive to commence such proceedings, thus creating an exception which swallows the American Rule set forth in *Alyeska*.

Conclusion

For all the foregoing reasons, Petitioners respectfully submit that the errors inherent in *Mishawaka I* and *Mishawaka II* warrant correction by this Court and the issuance of a Writ of Certiorari to the Seventh Circuit.

Respectfully submitted,

WHITNEY NORTH SEYMOUR
WILLIAM J. MANNING
Counsel for Petitioners
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Of Counsel:
SIMPSON THACHER & BARTLETT
LIVINGSTON, DILDINE, HAYNIE & YODER

June 27, 1980

No. 79-2059

Supreme Court, U. S.
FILED
SEP 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal Corporations,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

WHITNEY NORTH SEYMOUR
WILLIAM J. MANNING
Counsel for Petitioners
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Of Counsel:
SIMPSON THACHER & BARTLETT
One Battery Park Plaza
New York, New York 10004
(212) 483-9000
LIVINGSTON, DILDINE, HAYNIE & YODER
425 Lincoln Bank Tower
Fort Wayne, Indiana 46802
(219) 423-9411

September 8, 1980

TABLE OF AUTHORITIES

PAGE

Cases:

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 4

City of Groton, et al. v. *Connecticut Light & Power Co.*, Civil No. 15,609 ..... 1, 2, 3, 4

City of Mishawaka, Indiana, et al. v. *American Electric Power Company, Inc., et al.*, 616 F.2d 976 (7th Cir. 1980) [*Mishawaka II*] 2, 3, 4

City of Newark v. *Delmarva Power & Light Co.*, 467 F.Supp. 763 (D. Del. 1979) 3

Gas Light Co. of Columbus v. *Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972) 3

Keogh v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922) 3

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-2059

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal Corporations,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners file this Supplemental Brief, pursuant to Rule 22.6, to call attention to a new decision issued August 27, 1980 by the United States District Court for the District

of Connecticut (Blumenfeld, J.) in *City of Croton, et al.* v. *Connecticut Light & Power Co.* The *City of Groton* case, which we believe to be the first decision in this field since *Mishawaka II,* was one of a number of similar cases cited to this Court as pending in the district courts. *See Petition* 12n.; Reply Brief 2-3.*

The fact that this conflicting decision is by a district court merely highlights and should not obscure the probability that failure to grant the Petition is likely to cause a multiplying confusion in many federal courts. We respectfully suggest that this Court should properly be concerned with the proliferation of similar issues foreshadowed by the citations to numerous similar cases in the Petition (12n.) and the aggregation of conflicts with regulatory authorities. Heavy burdens will be imposed on the trial courts in deciding after long, expensive and time-consuming trials, whether to follow *Mishawaka II,* the decision in the *City of Groton,* or some other decision. Under these circumstances, we respectfully suggest that the conflict between *Mishawaka II* and the *City of Groton* decision should be given weight analogous to that ordinarily accorded to conflicts between circuits, or to conflicts with the decisions of this Court such as exists in the *Noerr-Pennington* issue, the state action (*Parker* v. *Brown*) issue and the implied repeal (*Gordon* v. *New York Stock Exchange*) issue, all raised in the Petition (16-25).

---

* Since the *City of Groton* decision was filed so recently that it is not presently reported, the entire text of the "Memorandum of Decision" is reproduced in the Supplemental Appendix ("SA") to this Supplemental Brief. The Clerk of the United States District Court for the District of Connecticut has advised counsel for Petitioners that the "Memorandum of Decision" is available for publication, though it cannot be represented to this Court that the decision will be published.

The *City of Groton* decision concludes as a matter of law that, under *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156, 162-63 (1922) and *Gas Light Co. of Columbus* v. *Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972), "the rates made legal under the Federal Power Act are the legal rates as between the supplier, . . . and the buyers, the municipalities." 19 SA. Since the municipalities in *City of Groton* paid the legal rate, it was held as a matter of law that they could not establish antitrust injury. 19 SA. That crisp conclusion is diametrically opposed to the analysis and the result in *Mishawaka II*, and squarely responds to the determinative questions presented on this Petition. The *City of City of Groton* decision also recognizes the pre-existing "split of authority" between *Mishwaka II* and *City of Newark* v. *Delmarva Power & Light Co.*, 467 F. Supp. 763 (D. Del. 1979), "over whether [the antitrust] court should even consider the mertis of the price squeeze claim where both the wholesale and resale prices are completely regulated by government agencies." 30 SA n.19.

The decision in *City of Groton* has direct bearing on questions "1", "2", "4", "5" and "7" presented for review. Petition 3-6. That case—litigated by similarly situated parties, in the same industry, under the same statute, addressing a similar challenge to rates and to other utility acts, and presenting a similar nexus of issues—discredits Respondents' claims that the case on which review is sought here is of narrow interest by reason of its "unique facts" (Respondents' Brief 6).

In *City of Groton*, as in *Mishawaka II*, the central problem is the conflict between the Federal Power Act and the

Sherman Act in the context of regulated utility rates. 17 SA. In *City of Groton,* as in *Mishawaka II,* "price squeeze" allegations were linked with other claims arising from the contractual relationships of the electric supplier and its customers, including the reasonableness of contract terms and the utility's termination of its service agreements with the Municipalities (8 SA). The same operational decisions faced by Petitioners and by the utility in the *City of Groton* case raise antitrust risks under *Mishawaka II* for all utilities whose rates are subject to dual regulation under the Federal Power Act and state statutes. For example, the utilities in both cases petitioned for rate relief prior to the Federal Commission's adjudication of prior rate relief petitions (*see* 11-12 SA), a practice condemned in *Mishawaka II* as an abuse of the administrative process that strips such filings of *Noerr-Pennington* protection (*see* Appendix to Petition 13a-17a).

Finally, with respect to question "7" raised by the Petition, *City of Groton* (33-35 SA) dismissed the utility's counterclaim for an award of counsel fees "expended in connection with the defense of this matter." 33 SA. In rejecting an award of counsel fees directly related to the antitrust claims, the *City of Groton* decision places its main reliance on the "American Rule" as set forth by this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 247 (1975), the same case upon which Petitioners placed their primary reliance. Petition 29-30; Reply Brief 9-10.

Conclusion

The additional reasons contained in this Supplemental Brief add fresh support to Petitioners' request that their Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

WHITNEY NORTH SEYMOUR
WILLIAM J. MANNING
Counsel for Petitioners
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Of Counsel:
SIMPSON THACHER & BARTLETT
LIVINGSTON, DILDINE, HAYNIE & YODER

September 8, 1980

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT

District of Connecticut

Civil No. 15,609

City of Groton, *et al.*

v.

Connecticut Light & Power Co., *et al.*

MEMORANDUM OF DECISION

In February of 1973, several Connecticut municipalities filed a complaint against the investor-owned utilities that supplied them with electric power, alleging a variety of antitrust violations. Now, over seven years later and after a seven-week trial, the time for a ruling on the merits is at hand.

I.

The Parties

When the suit was begun, there were six plaintiffs, all towns in Connecticut. Each of these towns possessed its own electrical distribution network, and each purchased power at wholesale from the defendant, Connecticut Light & Power Co. ("CL&P"). The state granted each town a charter which provided it with the exclusive right to sell power at retail to customers within its geographic limits.

Three of the municipalities, the City of Norwich ("Norwich"), the Town of Wallingford ("Wallingford"), and the Second Taxing District of Norwalk ("Norwalk II"), also had a limited capacity for generation which, while inadequate to supply all of their towns' residential and commercial needs, was capable of supplementing their wholesale purchases of bulk power.[1]

The defendants include Northeast Utilities, Inc. ("NU"), a holding company incorporated in Massachusetts, and its wholly-owned subsidiaries. In 1966 CL&P, a Connecticut corporation, joined with Hartford Electric Light Company ("HELCO"), another Connecticut utility corporation, and Western Massachusetts Electric Company ("Western Mass"), a Massachusetts utility, to form NU. NU now owns all of the common stock in CL&P, HELCO and Western Mass. NU also owns all of the stock in Northeast Utilities Service Company ("Service Co."), a service company for the entire system which provides, among other things, financial planning and accounting services to the subsidiary companies. Although all of these companies, except Western Mass, have been named as defendants, the evidence at trial established that the plaintiffs' dealings and transactions were solely with CL&P.

Both CL&P and HELCO provide retail service in Connecticut pursuant to exclusive state franchises. The franchise areas of municipalities, CL&P, and HELCO contain no overlapping areas. All of the municipals' franchise areas except for that of Wallingford are totally surrounded by the franchise areas of CL&P and HELCO.

---

1. Shortly before trial actually commenced, three of the six plaintiffs, City of Groton, Borough of Jewett City, and Norwich, reached a settlement agreement with the defendants. The other three plaintiffs, Wallingford, Norwalk II and the Third Taxing District of Norwalk have pressed the suit to completion.

II.

A. *History of the Contractual Relationships Between the Plaintiffs and CL&P*

In 1948, CL&P was supplying all of the municipalities with electrical power pursuant to contracts with each of them. The City of Groton ("Groton"), the Third Taxing District of Norwalk ("Norwalk III"), the Borough of Jewett City ("Jewett City"), and Wallingford were total-requirements customers, *i.e.,* they purchased all of their power from CL&P. In Norwich and Norwalk II, CL&P supplemented the power the towns were able to generate on their own.

During the 15-year period between 1948 and 1963, these supply contract arrangements were changed only slightly. For a brief period following World War II, both Norwich and Norwalk II were able to become totally self-sufficient. Similarly, in the early 1950's, by constructing the Pierce Generating Station, Wallingford was able to change its status from a total-requirements customer to one able to generate all the energy it needed. In all three of the generating communities, however, the growth of demand for electricity soon outstripped the capacity for self-generation and all three looked to CL&P to supply their supplemental needs. As of 1962, CL&P was supplying all the needs of Groton, Norwalk III, and Jewett City, and all the supplementary requirements of Wallingford, Norwich, and Norwalk II.

In 1962, CL&P began to negotiate with all six towns for a new contract. At this time, at least some of the municipal systems were again considering the installation of new equipment as a step toward total self-generation.

The evidence at trial established that the negotiations over the new contract were intensive and thorough. Both sides had the benefit of counsel and consultants. Both the municipalities and CL&P conceded some points and provided some inducements in order to obtain agreement on others.

In 1963-64, new agreements ("1963 contracts") were finally reached with each of the towns. These contracts were ten-year, full-requirement contracts. The charge to the municipalities for the supply of electricity was to be based on two components. A "demand" charge was leveled to recoup fixed costs, and an "energy" charge was computed to recover variable costs. This form of rate was not uncommon in the industry at the time and, in fact, it was the same rate structure as had been used in prior CL&P-municipal contracts.[2] The evidence suggests that initially both the municipalities and CL&P were fairly satisfied with the term and rates embodied in the contract.

This satisfaction was short-lived, however. In 1965 and 1966, the municipalities began to agitate for a modification of the contract that would reduce their rates. Acting together, they hired a new consultant, Mr. Alexander Wiskup, who, after he arrived in 1965, performed what he considered a "quickie cost of service analysis." His figures led him to believe that a substantial reduction in the rates charged to the towns was warranted. CL&P countered by

2. All of the contracts and tariffs governing the relations between CL&P and the municipals were filed for regulatory review. In 1963, when the 1963 contracts were first completed, the Federal Power Commission ("FPC") did not claim to have jurisdiction over wholesale rates charged by utilities. However, in 1964, the Supreme Court ruled that they had such jurisdiction. *FPC* v. *So. Calif. Edison Co.*, 376 U.S. 205 (1964). Thereafter, in late 1964, the utility companies submitted the contracts for review. Every modification to their terms and all the subsequent tariffs were carefully reviewed by the appropriate regulatory commission.

offering a smaller rate adjustment. Unable to reach a compromise, the municipalities then filed a complaint before the Federal Power Commission ("FPC"). In June of 1967, after further negotiations, the FPC secured the parties' agreement to a modification ("1967 contract"), which provided for an annual billing reduction of approximately $260,000. The modification also changed several other provisions in the 1963 contracts. It reduced the previously required three-years advance notice of cancellation to one year and clarified the municipalities' right to install new generating equipment without being in breach of the contract. The 1967 contract also provided for the establishment of a Joint Advisory and Review Committee composed of representatives of the municipalities and the private utilities. This committee was established to discuss various additional modifications desired by the municipalities.

As part of the negotiations leading up to the 1967 contracts, CL&P offered to replace the 1963 contracts with a new rate form. On October 11, 1967, a meeting was held with CL&P officials and representatives of the municipalities at Haddam Neck, Connecticut. There the company unveiled its new proposal, referred to at trial as the "Haddam Neck" proposal, which included two separate contracts. Under the terms of the first, each municipality was to pay CL&P for its total system demand. That is, each municipality would pay CL&P as if it had purchased all of its electricity from CL&P even if it had some capacity for self-generation. Then, in its second contract, CL&P would contract to buy all of the generating capacity which each of the municipalities owned. CL&P would have the right to direct when each of the municipals' generating systems

would have to operate. The plaintiffs deemed this arrangement to be unsatisfactory and turned down the offer.

In 1968, the parties entered into yet another contract ("1968 contract"). Under the terms of the 1963 contracts, the municipalities had been given a certain credit for the generating capacity that they had available. In order to earn the credit, they had to operate their generating units for two hours a day during three months of the year. For the remaining nine months of the year the municipalities were allowed to shut down their generators completely. In the 1968 contract CL&P agreed to purchase this "excess" capacity. That is, it purchased the right to call on the municipalities during these nine months to operate their units for the benefit of CL&P. While the 1968 agreement was in effect, CL&P only rarely availed itself of this perogative.

Acting together in the context of the Joint Advisory and Review Committee, the municipalities continued to complain both about the level and the structure of the rates in the 1963 agreements which had already been modified once as a result of the 1966-67 FPC proceedings. In late 1969 and early 1970,[3] these complaints prompted three pro-

3. The appropriate statute of limitations cut-off date applicable to this action is February 13, 1969, four years prior to the commencement of the action. 15 U.S.C. § 15b (1976). Evidence of conduct prior to that date has been recounted here and was offered at trial for three reasons. First, it was offered as background to make the plaintiffs' claims more understandable. Second, the prior interactions between the parties was put in evidence to support the claim that the defendants acted with an intent to monopolize the market in their post-February 1969 actions. Finally, the history prior to the cut-off date is relevant in that anti-competitive injury suffered after the cut-off date which was caused by anti-competitive conduct prior to that date is compensable under the antitrust laws. *See Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 295-96 (2d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3532 (Feb. 19, 1980).

posals referred to at trial as Alternatives 1, 2, and 3. These proposals were all drafted by CL&P, and the municipals offered counter-proposals. Again, the parties failed to reach any agreement. While the provisions of these rates are not particularly relevant to this proceeding, it is worth noting that all of the Alternatives were based on the same demand/energy rate structure contained in the 1963 agreements.

The next significant interactions between these parties came with the circulation of Offers of Power by the Maine Yankee and Vermont Yankee Nuclear Power Corporations in August 1970. CL&P and other major investor-owned utilities had decided to construct two large nuclear plants in Maine and Vermont. By order of the Securities and Exchange Commission, these companies were obligated to offer other New England utility systems an opportunity to participate in the nuclear projects. Participation was made possible through "entitlements." Purchase of an entitlement enabled a utility system to receive a certain percentage of all the power generated by the plant for 30 years. When the power plant was operating, the participant would receive its percentage share. When the unit was "down," *i.e.*, not operating, the participant would receive nothing.

The municipalities did not accept these offers either.[4] In letters of October 22 and 23, 1970, Mr. William M. Clinton, on behalf of all the municipalities, declined the Main and Vermont Yankee offers, claiming that the municipalities had inadequate information on which to base a decision to participate. Nonetheless, his letter expressed appreciation to CL&P and NU for making available the limited

4. Evidence was introduced at trial suggesting that at least one of the plaintiffs, Wallingford, was prohibited by its charter from entering into a contract with a term in excess of ten years.

amount of technical data relating to these offers which they had in their files.

Because the parties were unable to agree on changes to the 1963 contracts except as they were modified by the 1967 and 1968 agreements, they continued to govern the applicable rates between CL&P and the municipalities. By the late 1960's and early 1970's, the cost of supplying energy had started to rise for the first time in several decades. The contracts established in 1963 had not anticipated any such rise, and CL&P began to realize losses in its sales of electricity to the plaintiffs. When it became apparent that the municipalities would not agree to the terms of Alternatives 1, 2, or 3, CL&P decided to exercise its right to cancel the contracts unilaterally. In February 1971 the requisite one-year notice was given. Because CL&P's rates had become so favorable to them, the municipalities challenged the cancellation notice before the FPC. The FPC, however, upheld CL&P's action and the 1963 contracts were terminated in 1972.

Shortly before the 1963 contracts expired, however, one additional round of negotiations took place. CL&P had planned to build a large pump-storage electrical plant at Northfield, Massachusetts. As it was explained at trial, a pump-storage plant is composed of essentially two pools of water at different elevations. At night, when the demand on CL&P's conventional power units is low, the units are used to pump the water from the lower pool to the higher one. Then, during the hours of peak demand on the following day, the water in the upper pool is released through turbines thereby generating additional energy. By utilizing a pump-storage plant, CL&P was able to save the capital costs necessary to construct the more expensive conven-

tional units which would otherwise be needed to insure adequate capacity for peak periods of demand.

In late 1972, primarily as a bargaining chip for its "nuisance value," the municipalities filed a complaint with the FPC insisting that they be offered an opportunity to participate in the Northfield project. The FPC ruled in their favor, but only Mr. John Gallagher, on behalf of Wallingford, indicated even conditional interest. After CL&P agreed to allow Wallingford to file a conditional acceptance, Mr. Gallagher never responded. None of the plaintiff-municipalities has ever purchased any entitlements in the Northfield pump-storage unit.

In 1972, the 1963 contracts were terminated and replaced by a tariff. This tariff, known as the R1 rate, was never accepted or agreed to by the plaintiffs. Pursuant to the applicable statutes and regulations,[5] CL&P simply filed the rate with the FPC[6] and, after a brief period of suspension, it automatically took effect, subject to a later challenge and possible refund. The R1 rate was in effect from January 1973 until September 1974. By the time that the FPC was able to consider plaintiffs' objections to its terms, it already had been replaced by the filing of a new R2 rate.

While the R1 rate will be discussed later in this opinion, a brief description of the rate may be useful at this time. The R1 rate utilized a new type of rate structure which established charges based on stratified costs rather than on overall average costs.

---

5. *See* 16 U.S.C. § 824d (1976); 18 C.F.R. § 35.0 *et seq.*

6. The R1 rate was filed with the FPC but some later filings were made before the Federal Energy Regulatory Commission ("FERC"), which superseded the FPC on October 1, 1977. 42 U.S.C. § 7172(a) (Supp. I 1977). FERC's regulatory role supplants that of the now defunct FPC.

Under the 1963 contracts, demand charges levied on a per kilowatt basis had been assessed primarily to cover the capital costs of the generating units necessary to provide the municipalities with the capacity they needed throughout the year. In calculating this charge, the fixed costs associated with all of CL&P's generating equipment had been divided by the total kilowatts of demand, and the resulting average cost per kilowatt was charged for each kilowatt of demand without reference to which plant generated the particular energy delivered. Thus, if CL&P had one plant with demand costs of $2/kw, one with costs of $3/kw, and another with $4/kw, it would charge the average price ($3/kw) for each kilowatt without regard to which plant actually generated the energy in question.

Under the stratified rates, however, CL&P did away with this average-cost pricing. In terms of the grossly simplified example above, a stratified rate would result in a charge to a customer of $2/kw if the energy purchased was from the $2/kw unit, $3/kw if it was from the $3/kw unit, and $4/kw if it was from the $4/kw unit.[7] The economic experts at the trial referred to this as an "unbundling of costs."

In addition to this change in the rate structure, the R1 rate differed from the 1963 contracts in that it was not a

7. At trial, it was shown that the power supplied to the municipals could be categorized into different types. For a relatively few hours during each year the demand for electricity soared substantially above the more ordinary power requirements. These hours were referred to as the "peak" period. During this peak period the power supplied over and above the usual amount of power supplied constituted "peak" power. Peak power, unlike other power (base-intermediate power), is provided from peak unit generators which generally have smaller fixed capital costs than do the base-intermediate units. Under the stratified rates, the demand charge for a unit of peak power was much less than the demand charge associated with base-intermediate power.

total-requirements contract. In Rider A, an appendix to the main body of the R1 rate, CL&P provided for

> "situations when a wholesale customer elected to participate in [the New England Power Pool ("NEPOOL")[8]] and to subject its own generation to NEPOOL dispatch, or to participate in a jointly owned generating unit either as an owner or a unit contract purchaser.
>
> "Under Rider A, CL&P would supply service up to a specified contract demand, *on a partial-requirements basis,* when a customer became a NEPOOL participant and took entitlements from sources outside CL&P's system."

The Connecticut Light and Power Company, F.P.C. Docket No. E-7743 (July 29, 1974), at 23 (emphasis added).

In September 1974 the R1 rate was voluntarily withdrawn by CL&P and superseded by the R2 rate. The R2 rate was also a stratified rate, but it contained no equivalent to the Rider A found in R1. At trial, CL&P explained that Rider A was omitted from the R2 filing because none of the municipalities had expressed any interest in making use of its provisions. When the FPC later got around to ruling on the R1 rate it, too, noted the lack of interest in Rider A and ordered it stricken from the tariff as "premature." The R2 rate did contain, however, a proviso which expressed the company's willingness to negotiate a partial-requirements rate any time a municipal customer expressed an interest in purchasing power from outside sources.

The R2 rate, like the R1 rate, was never accepted by the municipalities and was challenged before the FPC.

---

8. The significance and development of NEPOOL is considered at length, *infra,* at 12 *et seq.*

Like the challenge to the R1 rate, the challenge to the R2 rate was not resolved until after the R2 rate was superseded by a subsequent rate filing. This did not moot out the challenges to R1 and R2, however, which resulted in some substantial refunds to the municipalities.

On March 2, 1976, the R3 rate became effective, and in February 1979 it was replaced by the R4 rate. Both the R3 and the R4 rates continued the same basic concept that had been established in the R2 rate. The levels of charges were increased to reflect CL&P's rising costs, but the structure remained essentially intact . The R4 rate is still in effect today.

B. *Development of NEPOOL*

The interactions between the parties which are chronicled above took place against the backdrop of more extensive negotiations between utilities in New England. In order to fully understand and evaluate the plaintiffs' claims, it is necessary to outline briefly the genesis and purpose of the New England Power Pool ("NEPOOL").

In 1965, New York and New England suffered a major power blackout. As a result of concern generated by this shortage and as a result of increasing pressure to achieve economies of scale, some of the major New England utility companies began to explore the possibility of pooling their resources to achieve greater reliability and greater economy in the generation of power. Early drafts of a pooling agreement were circulated to the various New England utilities in the late 1960's, but these proposals were generally unacceptable to them.

Thereafter, on June 19, 1969, a large meeting open to all utility companies in New England and to various regu-

latory bodies was held in Northfield, Massachusetts. Representatives from NU and from the municipalities were present. At this meeting a working committee was established to develop a more acceptable pooling proposal. The working committee met regularly for the next year, and its meetings were open. Although membership was apparently fluid, both NU and the Connecticut municipalities were usually represented at these meetings. Various federal and state regulatory officials were also in attendance.

In the spring of 1970, the working committee produced and circulated two documents. The first was entitled "Interim NEPEX Power Exchange Agreement" ("NEPEX"), and it established an interim pooling arrangement eventually to be superseded by the NEPOOL agreement. The second document was a "letter of intent" expressing, on behalf of the signatories, an intent to join in the NEPOOL agreement when such an agreement was finally prepared. Both of these documents were endorsed on behalf of NU and CL&P, and the letter of intent was endorsed on behalf of all of the municipalities. General widespread support for NEPOOL was evidenced by the large proportion of New England utility systems which signed the letter of intent. NEPEX went into effect in June of 1970 and continued to govern the affairs of its participants until September 1, 1971 when NEPOOL became effective.

NEPEX and NEPOOL have no corporate status, nor have they ever owned any generating or transmitting equipment. NEPEX and NEPOOL are merely agreements designed to increase protection against blackouts and to save costs. To these ends, three separate policies have been instituted. First, all generation has been placed in

the control of a central dispatcher whose job it is to "bring on line" the cheapest available sources of energy in New England and to bring enough of them "on line" to cover all of the demand for power in New England. His decisions are to be made without reference to ownership. This was referred to at trial as "economy interchange."

The second major thrust of NEPOOL is to provide for pooled resources to construct large, efficient units capable of achieving significant economies of scale. The Maine and Vermont Yankee Nuclear Power offerings, while predating NEPOOL, exemplify this form of joint effort. Under NEPOOL, a participant in one of these joint projects is entitled to have any energy generated by the plant transmitted to it over the transmission lines of other NEPOOL participants. The rate for such transmission, or "wheeling" as it is often referred to, does not depend on the distance between the participant's distribution system and the generator. This is referred to as a "postage stamp" rate because unlike traditional charges for wheeling it is not distance-sensitive.

Finally, by interconnecting the utility systems greater reliability is attained. A unit ready to "go on line" in Maine, for example, can serve as a reserve for a system operating in Rhode Island. Thus, interconnection also substantially lessens the chances of future power blackouts.

During the planning stages for NEPOOL in the late 1960's and early 1970's, the plaintiff-municipalities expressed great interest in establishing and participating in NEPOOL. As noted, they signed a letter of intent indicating a willingness to participate in NEPOOL as late as May 1970. However, when the NEPOOL agreement was finally prepared in September 1971, the municipalities refused to join.

The municipalities point to various "oppressive" and "discriminatory" provisions in both the NEPOOL agreement and in Rider A to the R1 rate.[9] It appears quite unlikely, however, that these provisions explain why the Connecticut municipalities did not join NEPOOL. An examination of the provisions of NEPOOL reveals that they are neither onerous nor unreasonable. NEPOOL now includes nearly 50 other municipal systems which finds it an acceptable arrangement.

The legality of the NEPOOL agreement has already been thoroughly considered. In November 1975, an Administrative Law Judge considered "[w]hether the NEPOOL agreement is contrary to anti-trust law and policy." He decided that it was not. With respect to the provisions which the NEPOOL agreement now contains,[10] the FPC affirmed the Administrative Law Judge's decision. On appeal, the ruling of the FPC was affirmed by the United States Court of Appeals for the District of Columbia. *Municipalities of Groton* v. *Federal Energy Regulatory Commission,* 587 F.2d 1296 (D.C. Cir. 1978).

Rather than any restraints allegedly imposed by the provisions of NEPOOL, the underlying reason for the plaintiffs' reversal of their intention to participate may be found in the minutes of a meeting of the Connecticut Municipal Electric and Gas Association held on June 1, 1973 in Guilford, Connecticut. The final determination on

9. Had the plaintiffs joined NEPOOL and still received some electricity from CL&P while the R1 rate was in effect, they would have taken the electricity subject to Rider A.

10. The FPC did rule that two provisions, the 30 percent term and the "capability responsibility" term, discriminated against smaller utilities. These two provisions are described in a later portion of this opinion and the effect of the FPC ruling is also considered. *Infra,* at 25-27.

whether the plaintiffs would participate in NEPOOL was to be made at the meeting. The Secretary of the group recorded the following:

> "Regarding NEPOOL, Mr. Wheatley said that signing the NEPOOL Agreement would be detrimental to our anti-trust case and it was agreed that the Connecticut Municipals would not sign the Agreement."

III.

Preliminary Analysis

While the plaintiffs were invited to file a brief setting forth specific claims, their efforts in response fall short of what might have been hoped for. Throughout this action they have persisted in which might charitably be considered the "shotgun" approach to antitrust litigation: they have challenged everything and now hope to hit something. Rather than discussing each of the myriad claims which the plaintiffs advance, it will be useful roughly to divide these claims into two groups.

First, the vast bulk of the plaintiffs' claims are addressed to the terms and conditions set forth in the contracts and rates themselves. With respect to the 1963 contracts and R tariffs, the plaintiffs claim that the ratchet and reserve requirements, the territorial restrictions on resale, and the methods for calculating the rates all constituted anticompetitive restraints. Unifying all of these foregoing separate claims is the nature of the defendants' alleged anticompetitive behavior. In each of these claims the defendants are alleged to have engaged in anticompetitive conduct by agreeing to the terms in a contract or by filing

a tariff containing certain terms. The contracts or tariffs in which these defendants have participated have all been promulgated pursuant to the Federal Power Act, 16 U.S.C. §§ 791a *et seq.*, and reviewed by the relevant Commissions.

In their second group of claims, plaintiffs have alleged that the defendants engaged in anticompetitive behavior beyond the mere promulgation of the rates and conditions of service. In particular the plaintiffs complain (1) that CL&P refused to wheel power to or from outside sources over its transmission lines, (2) that CL&P joined a NEPOOL agreement containing anticompetitive terms, (3) that CL&P delayed in offering a partial-requirements rate which would have permitted the plaintiffs an opportunity to supplement CL&P power with power from other utilities, and (4) that CL&P placed the municipalities in a price squeeze by charging more for its sale of power to the plaintiffs at wholesale than it did for the sale of power at retail to its own industrial customers.

I consider first the claims based on the rates and conditions of service.

A. *The Role of Regulatory Agencies*

This case raises the question of how the policy against restraint of trade exercised by monopoly power as expressed in the Sherman Act, 15 U.S.C. § 1 *et seq.* (1976), should be accommodated to the public utility business of the defendants, who are franchised monopolies by public grant. As public utilities, they were long subject to detailed and continuous regulation by the FPC under the Federal Power Act, 16 U.S.C. § 824 (1976), and are now comprehensively regulated by the FERC, *see* note 6 *supra*. Of course, it is well settled that the mere existence of a

regulatory body will not provide the defendants a blanket immunity against all antitrust claims. *Otter Tail Power Company* v. *United States,* 410 U.S. 366 (1973); *City of Newark* v. *Delmarva Power & Light Co.,* 467 F. Supp. 763 (D. Del. 1979). Nonetheless, the remedial goal of both the federal antitrust and the regulatory energy laws is to protect consumers against being subjected to unfair charges for goods or services which monopoly power makes possible.

While there is a potential for an evil use of monopoly power, it is not the mere existence of that potential but rather its illegal exercise which the Sherman Act forbids. Thus, where eight railroads and twelve individuals conspired to maintain unreasonably high freight rates, Justice Brandeis, writing for a unanimous Court, held that even if the rates challenged by a shipper were the product of a conspiracy, no action would lie. The Court reasoned that the rate "is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Antitrust Act. What rates are legal is determined by the Act to Regulate Commerce." *Keogh* v. *Chicago & Northwestern Railway Co.,* 260 U.S. 156, 162 (1922). The opinion continued:

> "Section 7 of the Antitrust Act, [current version at 15 U.S.C. § 15 (1976)] gives a right of action to one who has been 'injured in his business or property.' Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier."

Id. at 163.

Similarly, the rates made legal under the Federal Power Act are the legal rates as between the supplier, CL&P, and the buyers, the municipalities. The municipalities had no legal right to receive any rate other than the rate on file with the Commission. Since they received the legal rate, they, like the carrier in *Keogh,* were not injured in their business or property. Absent such an injury they have no right of action for relief.[11]

The fact that the FPC later ordered certain aspects of the rates rejected and excluded does not mean that CL&P

---

11. Reliance on the *Keogh* doctrine is supported by a more recent decision of the Court of Appeals for the Fifth Circuit. In *Gas Light Co. of Columbus* v. *Georgia Power Company,* 440 F.2d 1135 (5th Cir. 1971), *cert. denied,* 404 U.S. 1062 (1972), the court ruled that where a regulatory body exercised complete control over rates and practices of a private utility, a court would be precluded from granting antitrust relief based on a challenge to the rates. While the regulatory body involved in *Gas Light* was a state rather than a federal body, this is a distinction without a difference. The court in *Gas Light* reasoned:

> "Each of these acts and practices are rate schedules and each has been considered by the Georgia Public Service Commission in an adversary proceeding. Each is effective by order of the Commission. . . . [Two of the provisions complained of] were left in effect but Georgia Power was ordered to revise [another term] in a manner prescribed by the Commission. Moreover, the Commission retains jurisdiction with respect to each of the rate schedules for entering such other and further orders as the Commission may deem proper."

Id. at 1137-38. The court further explained:

> "[T]he Commission here gave lengthy consideration to each of the practices and rates under attack, and after full adversary hearings ordered them into effect, some with major modifications. . . . Though the rates and practices originated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the Commission as products of the Commission. They are thus immune from the operation of the antitrust laws under the [*Parker* v. *Brown,* 317 U.S. 341 (1943)] exemption."

Id. at 1140.

was guilty of illegal conduct in applying those provisions before they were rejected. Until rejected by the Commission, CL&P was permitted and, in fact, required to charge under the provisions of the rates it had filed with the Commission.[12]

Moreover, even if the plaintiffs could be said to have a right of action notwithstanding the *Keogh* doctrine, I find that with respect to the terms of the 1963 contracts and R tariffs they still have not proved an antitrust violation. The fact that a utility may put a rate into effect by filing it with the Commission does not ipso facto establish that the rate is reasonable. On the other hand, the submission of the rate to the Commission for its scrutiny as to reasonableness goes a long way toward negating an inference that its purpose was to drive the plaintiffs out of business. *See Almeda Mall, Inc.* v. *Houston Lighting & Power Co.*, 615 F.2d 343, 354 (5th Cir. 1980). The particular aspects of the rates which the plaintiffs challenged in this case, both before the Commission and this court, were not so devoid of reasonableness as to justify the inference that they were intended to enhance CL&P's alleged monopoly power. *City of Mishawaka* v. *American Electric Power Co., Inc.*, 616 F.2d 976, 985 (7th Cir. 1980).

Nor do I infer from any of the other evidence in the case that the defendants acted with any intent to monopolize. Their rates and provisions were reasonable, and the

12. 18 C.F.R. § 35.1(e) provides:
"No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, or impose any classification, practice, rule, regulation or contract with respect thereto, which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown."

legitimate business justifications they offered to explain their actions are entirely credible. Since intent to monopolize must be shown to establish their Sherman Act claims against these regulated utilities, *Mishawaka, supra* at 985, plaintiffs have failed to establish this element of their proof.[13] Furthermore, these provisions do not constitute unreasonable restraints on trade nor does their inclusion amount to conduct in violation of section 2 of the Sherman Act. Of course I do not sit to review the action of the Commission, but, even if I were to consider and review these rates de novo, I would also conclude, despite the spirited contentions of the plaintiffs to the contrary, that the rates, including every condition or qualification of them, and the factors upon which they were based, do not support a right of action under the antitrust laws.

---

13. In the usual case of monopolization, the intent required under section 2 need not be a specific intent to monopolize. *United States* v. *Griffith,* 334 U.S. 100, 105 (1948). However, in cases involving regulated utilities, general anticompetitive intent ought not suffice to show a violation of section 2. It has been persuasively argued that *specific* intent to impair plaintiffs' competitive ability and to preserve an existing monopoly should be required. *City of Mishawaka* v. *American Electric Power Co., Inc.,* 616 F.2d 976 (7th Cir. 1980).

> "In *Sargent-Welch,* we relied on *United States* v. *Griffith,* 334 U.S. 100 (1948). . . . In *Griffith,* it was held that it is not always necessary to find specfic intent lest it cripple the Sherman Act. *Id.* at 105, 68 S.Ct. at 944. In the particular circumstances, however, of a regulated utility struggling with dual regulation, bearing in mind that the utility is entitled to recover its cost of service and to provide its investors with a reasonable rate of return, we believe that something more than general intent should be required to establish a Sherman Act violation."

Id. at 985. *Cf. Almeda Mall, Inc.* v. *Houston Lighting & Power Co.,* 615 F.2d 343, 354 (5th Cir. 1980) ("Monopolization cases involving such regulated industries are special in nature and require close scrutiny.").

B. *Conduct Not Relating to Rates*

Notwithstanding the above discussion, the claims presented by the plaintiffs which are not based on provisions in the rates still remain for the court's analysis. As indicated above these include the alleged refusal to wheel power, the alleged anticompetitive terms of NEPOOL, the alleged refusal to offer a partial-requirements rate, and the price squeeze allegations. Plaintiffs raise these claims under section 1 and section 2 of the Sherman Act and under section 2(a) of the Clayton Act.[14] As set out below, the evi-

14. The elements which plaintiffs need prove to prevail on these claims are set out below.

Section 1 of the Sherman Act

"To sustain this claim, plaintiffs must prove by a fair preponderance of the evidence two essential elements: first that the defendants entered into a 'contract, combination . . . or conspiracy,' and second, that such contract, combination or conspiracy was in restraint of trade or commerce among several States.'" *DuPont Glore Forgan, Inc.* v. *American Telephone and Telegraph Co.*, 437 F. Supp. 1104, 1111 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367, *cert. denied*, 439 U.S. 970 (1978) (footnote omitted); *Almeda Mall, Inc.* v. *Houston Lighting and Power Co.*, 615 F.2d 343, 350 (5th Cir. 1980).

When and under what circumstances wholly owned subsidiaries can conspire with each other is a difficult question on which the law is not settled. It is also a question which need not be resolved here. For the purpose of this ruling, the court can assume *arguendo* that the plaintiffs have established the first element of their section 1 claim by establishing a sufficient intracorporate conspiracy. The second element—action in restraint of trade—will be discussed in the context of the specific claims which the plaintiffs advance.

Section 2 of the Sherman Act: Monopolization

In order to establish a "monopolization" claim, plaintiffs first must show that the defendants possessed monopoly power, *Berkey Photo, supra*, 603 F.2d at 272. Then they must establish either "the willful acquisition of that power" or the willful maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." *United States* v. *Grinnell*, 384 U.S. 563, 570-71 (1966); *Berkey Photo, supra,*

(footnote continued on next page)

dence presented clearly did not establish exclusionary conduct or conduct in restraint of trade as to any of these claims.

---

at 274. For the purpose of this ruling, it will again be sufficient to assume *arguendo* that CL&P and NU had monopoly power. The plaintiffs' proof on the other element of the offense, proof of impermissible monopoly conduct (referred to in this case as "exclusionary" conduct) will be discussed on a claim-by-claim basis below.

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act

Plaintiffs' complaint alleged that the "price squeeze," which was set up when CL&P allegedly charged lower rates to industries at retail than it charged to the municipalities at wholesale, constituted a violation of section 2(a) of the Clayton Act, 15 U.S.C. § 13(a). In their trial brief and post-trial brief, the plaintiffs now apparently have abandoned this claim.

It appears to be a claim properly abandoned. Among other problems, the plaintiffs cannot show discrimination in the price of any *commodity*. Electricity is not a commodity for purposes of the Act. *City of Newark* v. *Delmarva Power & Light Co.*, 467 F. Supp. 763, 774 (D. Del. 1979). Moreover, if the municipalities claim to be disfavored wholesale purchasers, it is not at all clear who the favored competing wholesale purchasers are. It cannot be the industries and commercial customers for they clearly do not compete with the municipalities. *Lupia* v. *Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1170-71 (8th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). Arguably the plaintiffs want the court to find the division of CL&P responsible for wholesale sales to be a favored purchaser. Thus, perhaps they hope to compare the "sale" of power from CL&P as a manufacturer to CL&P as a wholesaler with the CL&P sales to them. This they cannot do for an intracorporate transfer does not amount to a sale for purposes of the Clayton Act. *Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962 (5th Cir.), *cert. denied*, 48 U.S.L.W. 3309 (Nov. 6, 1979); *Diehl & Sons, Inc.* v. *International Harvester Co.*, 426 F. Supp. 110 (E.D.N.Y. 1976).

In short, abandoned or not, the Clayton Act claims must be dismissed. This, of course, does not necessarily bar the plaintiffs from raising the so-called price squeeze claim in the context of section 2 of the Sherman Act. *See City of Mishawaka* v. *American Electric Power Co., Inc.*, 616 F.2d 976 (7th Cir. 1980).

1. *Refusal to Wheel Power*

A refusal to wheel power would satisfy the conduct element of both plaintiffs' section 1 and section 2 claims.[15] *See Otter Tail, supra.* However, no such refusal to wheel power was shown here.

After carefully considering the trial testimony and supporting documents, I conclude that the plaintiffs have not carried their burden of proof with respect to the "wheeling" allegations. The evidence shows that NU repeatedly announced its general willingness to wheel power. During the time in question it entered into numerous wheeling contracts with other public and private utilities. There was no evidence that what the defendants would charge for wheeling power was ever withheld from the plaintiffs when they came to the defendants with a specific request. While the defendants were often unwilling to commit themselves as to what the charge would be until they were supplied details concerning the extent and timing of the requested wheeling, this was a reasonable approach by a company with transmission facilities with limited capacities.

Plaintiffs seek to make much of a 13-month CL&P delay in responding to a request by Wallingford to have 7,000 kilowatts of power wheeled in from Norwich. Wallingford's request for wheeling was dated October 7, 1971, and CL&P's response was not sent until December 8, 1972. Plaintiffs ask the court to find animus and anticompetitive behavior in the delay. On the contrary, I find the testimony of Mr. Quentin Quinn that he simply misplaced the initial request to be entirely credible. When he was subsequently reminded of the request he promptly responded with a

15. For a description of the other elements which the plaintiffs would need to prove to prevail on these claims, *see* note 14 *supra.*

letter setting forth the terms and rates under which wheeling would be made available. This delay was unintentional. It was not exclusionary conduct nor was it conduct in restraint of trade.

2. *Alleged Anticompetitive Terms in the NEPOOL Agreement*

While plaintiffs do not challenge the basic concept of pooled resources embodied in the NEPOOL agreement, they do challenge three separate aspects of this particular agreement. First, they claim that the failure to provide for the wheeling of "firm" power is an exclusionary omission which amounts to an unreasonable restraint of trade. I need not tary long over this claim. It has already been presented for adjudication in three other forums. An Administrative Law Judge, the FPC and the United States Court of Appeals for the District of Columbia have all rejected plaintiffs' arguments.[16] I find those decisions to be persuasive and, for the same reasons as are set forth in their opinions, I conclude that the omission of a term governing the wheeling of firm power was not anticompetitive.[17]

16. New England Power Pool Agreement, F.P.C. Docket No. E-7690 (No. 24, 1975) (Decision of C. Wagner, Presiding Administrative Law Judge); New England Power Pool Agreement, F.P.C. Opinion No. 775 (Sept. 10, 1976); *Municipalities of Groton* v. *Federal Energy Regulatory Commission,* 587 F.2d 1296 (D.C. Cir. 1978).

17. At an earlier stage in this case it was held that the existence of the FPC (now FERC) with all of its regulatory power over electric power utility companies did not give it prior jurisdiction which required a dismissal of this antitrust case. But even if the plaintiffs are entitled to proceed in a federal judicial forum for vindication of antitrust claims, it does not follow that the facts upon which the antitrust claim is based, which are squarely within the jurisdiction of the Commission to determine, may be relitigated de novo without reference to the Commission's prior rulings. This court accepts the

(footnote continued on next page)

Plaintiffs also challenge the inclusion of two terms. One provision challenged is the so-called 30 percent rule which prohibited any utility company from taking more than 30 percent of its peak capacity from any single unit. The other provision under challenge is the "capability responsibility" term. Under this term, each utility was required to maintain a proscribed level of generating capacity. Should a utility fall below its proscribed level it would be assessed a penalty based on the extent of the shortfall measured as a percentage of the required level of generating capacity.

Plaintiffs have also challenged these provisions in the regulatory process. The FPC, whose decision was affirmed by the United States Court of Appeals for the District of Columbia, ruled for the plaintiffs and required that these provisions be modified because, as written, they discriminated against smaller utility companies.[18] Even assuming, however, that I adopt the FPC's ruling, plaintiffs still do not prevail on this claim for they have not proved that they suffered any injury through operation of these provisions.

The challenged terms were never effective against these

---

prior findings of the Commission as highly persuasive. *Cf.* Fed. R. Civ. P. 53(e)(2). That Commission, after extensive hearings at which the parties appeared and offered evidence, considered and investigated and thoroughly scrutinized every aspect of the NEPOOL agreement challenged by the municipalities. In this undertaking it was aided by a full staff of employees with special expertise in the field of accounting, cost analysis of power generation and transmission, and every economic factor which could have any effect upon the determination of a fair and reasonable rate to charge for the particular kind of power to be sold, and the relative position of the parties in dealing with each other. The agency's findings of facts and conclusions have been submitted in evidence, and I accept its factual findings and conclusions. *See* Fed. R. Civ. P. 53(e).

18. New England Power Pool Agreement, F.P.C. Opinion No. 775 (Sept. 10, 1976) at 23-26; *Municipalities of Groton* v. *Federal Energy Regulatory Commission,* 587 F.2d 1296 (D.C. Cir. 1978).

plaintiffs for they were never members of NEPOOL. I do not find their claim that these provisions kept them from joining NEPOOL to be credible. These allegedly anticompetitive terms have been stricken from the agreement since September 1976, and none of these plaintiffs have yet made any efforts to become part of NEPOOL. As I noted above, the probable explanation underlying their refusal to join NEPOOL was their desire to maintain a favorable posture for damages in this antitrust suit. Thus, plaintiffs' allegations based on the NEPOOL agreement are without merit.

3. *Refusal to Offer a Partial-Requirements Rate*

Plaintiffs allege that CL&P deliberately withheld an offer of a partial-requirements rate in order to insure that the plaintiffs would be faced with an all-or-nothing proposition: either the plaintiffs would receive all of their power from sources other than CL&P or they would have to take it all from CL&P. If the plaintiffs had been able to prove this, they might well have established exclusionary conduct and conduct which constituted an unreasonable restraint of trade. However, the plaintiffs have again failed to carry their burden of persuasion on this question.

The plaintiffs' request for a partial-requirements rate during the pendency of the 1963 contracts was admittedly refused by CL&P. But, as the defendants forcefully argue, the 1963 contracts were total-requirements contracts in which CL&P had contracted to supply all of the power requirements for the municipalities. The municipalities had several opportunities to cancel these contracts but never chose to do so.

With respect to their claims about particular offerings, the plaintiffs' proof is even weaker. They argue that but for CL&P's refusal to provide a partial-requirements rate they would have joined in and reaped the benefits from the Maine and Vermont Yankee nuclear power plants and from the Northfield Mountain pump-storage plant. Their argument is unsupportable.

On their face, the Maine and Vermont Yankee offers required that utilities interested in participating indicate their *conditional* acceptance of the offer. Then, and only then, would NU be obligated to supply a partial-requirements rate. If the municipalities did not like the partial-requirements rate, they could decline to participate further without penalty for withdrawing.

These plaintiffs never even indicated their conditional acceptance. Thus, under the terms of the offer, any obligation NU may have had to provide a partial-requirements rate was never triggered. In Massachusetts, where municipal utility systems did indicate their conditional acceptance, they were promptly provided with a partial-requirements rate which many of them found acceptable.

The letter written by Mr. William Clinton on behalf of the municipalities in which he declined these offers never mentioned the need for a partial-requirements rate. In fact, evidence at trial suggested a far more plausible explanation of the municipals' rejection of the offers. At least some of the towns had been advised by their respective counsel that their charters prohibited them from entering into contracts with terms in excess of ten years.

Similarly, notwithstanding the arguments to the contrary, the evidence clearly established that NU offered to provide the municipalities with a partial-requirements rate

in order to permit them to participate in the Northfield Mountain project. NU allowed Wallingford (the only municipality that pursued the matter with them) to conditionally accept the entitlement subject to a later right to cancel within 30 days after receiving a partial-requirements rate. Again, notwithstanding the availability of conditional acceptances and partial-requirements rates, none of the municipalities elected to participate in this offering.

Finally, the plaintiffs ask this court to infer that CL&P deliberately withheld the R1 partial-requirements rate in order to minimize the chances that the municipalities had to purchase entitlements in new units. This claim was also unsupported. The R1 rate, which was designed to accommodate the desire of the municipalities to join NEPOOL, was released shortly after the NEPOOL agreement was finalized. Indeed, when the Commission reviewed the rate it concluded that the provisions in it concerning partial-requirements rates were too "premature," rather than too late. The Connecticut Light and Power Co., F.P.C. Docket No. E-7743 (July 29, 1974) at 24. For the foregoing reasons, the plaintiffs have totally failed to prove that CL&P unreasonably refused to offer partial-requirements rates.

4. *The Price Squeeze Claims*

Before considering the plaintiffs' claims that they were subjected to a "price squeeze," a bit of elucidation of the phrase may be helpful. The claim is that the defendants sold power to industrial customers at rates below those at which they sold to the plaintiffs in an attempt to squeeze the plaintiffs out of competition for industrial business. This claim calls for a shift of focus, for the question with respect to rates is not whether they were reasonable but

rather, whether they were discriminatory.[19] *See Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976).

The parameter within which the "price squeeze" was alleged to have had an adverse effect on the plaintiffs is quite limited. Let us examine the situation more closely. They were never "squeezed" in any specific situation. The plaintiffs do not complain that the defendants supplied cheaper electric power to any industrial customers located within the area of the towns which the plaintiffs were authorized to serve. Rather, their contention is that a lower rate to such customers elsewhere may have deterred potential industry from choosing to locate an industrial enterprise within their town's boundaries. While there was some hearsay evidence that electric power rates theoretically might be one of many factors that would be taken into consideration by a businessman in making a choice of a location for his industrial operations, its relative importance could not be assessed. And no instance of its ever having been of any real significance in the case of these plaintiffs or any other was shown. The duty is on the plaintiffs to raise their contention of substantial injury from the realm of speculation to the realm of fact. This they have not done.

> "The adverse effect upon competition requisite to establish the Section 2(a) [15 U.S.C. § 13(a)] violation with which the [plaintiffs have] here charged [CL&P]

19. There appears to be a split of authority over whether this court should even consider the merits of the price squeeze claim where both the wholesale and resale prices are completely regulated by government agencies. *Compare City of Mishawaka* v. *American Electric Power Co., Inc.*, 616 F.2d 976 (7th Cir. 1980) *with City of Newark* v. *Delmarva Power & Light Co.*, 467 F. Supp. 763 (D. Del. 1979). In light of the plaintiffs' failure of proof on this claim, however, I need not resolve this question.

> is that the price discrimination creates a reasonable probability of substantial injury to competition—such an injury as will with reasonable probability substantially lessen the ability of the unfavored dealers to continue to compete. . . . The protection intended to be afforded by the statute is directed to the preservation of competition. The statute's concern with the individual competitor is but incidental."

American Oil Company v. *F.T.C.*, 325 F.2d 101, 104 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964).[20] The sales of power by the defendants to industrial customers outside the plaintiffs' market had no "substantial" anticompetitive effect upon the plaintiffs. *Cf. F.P.C.* v. *Conway Corp.*, *supra.*

Plaintiffs have basically alleged two price squeeze claims. First, they have claimed that HELCO's rate to Pratt & Whitney Aircraft (P&W) was intermittently below CL&P's wholesale prices to the municipalities during the 1970's. Defendants dispute the plaintiffs' use of statistics to prove this price differential, but, even leaving that aside, the claimed injury to competition borders on the preposterous. There was absolutely no indication that P&W ever contemplated making the geographic move from East Hartford into one of the plaintiff's service areas nor was there any evidence that a like enterprise ever opted to establish itself in CL&P or HELCO's territory instead of in the

---

20. While *American Oil Company* v. *F.T.C.* arose under the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), its reasoning is applicable to this Sherman Act claim, 15 U.S.C. § 2, as well. Although 15 U.S.C. § 13(a) deals precisely with the sale of commodities as distinguished from the sale of electric power, *see* note 14 *supra*, it fits consistently within *Chapter I—Monopolies and Combinations In Restraint of Trade.* Thus, insofar as the law proscribing price discrimination that has an anticompetitive effect is concerned, decisions under section 13(a) may be regarded as analogous.

plaintiffs' territory. In short, the P&W-municipality disparity in rates, if there ever was one, did not cause the plaintiffs to suffer *any* injury whatsoever.

Plaintiffs' second-price squeeze claim is based on rate E-35, CL&P's rate to its industrial and commercial customers. Plaintiffs claim that during 1979 the E-35 rate was lower than the R4 rate applicable to the plaintiffs at wholesale. A careful examination of the figures offered by the plaintiffs and those offered in rebuttal by the defendants suggests that when all the relevant factors are taken into consideration, the price to the municipals was *not* higher than the price to CL&P's industrial customers. In fact, CL&P's price to the municipals was sufficiently below its price to its industrial customers that the municipalities would have been able to resell the power purchased from CL&P at CL&P's industrial rate and still earn a reasonable profit.

Moreover, even if there had been a price differential, the fact that it existed for only a very short time must be considered.[21] As noted by the court in *American Oil Company* v. *F.T.C., supra,* at 106:

> "[W]e do not mean to imply that a showing of intended permanency of the price discrimination is necessary to establish a Section 2(a) violation. But there must be something more than an essentially temporary minimal impact on competition and probative analysis must reveal a causal relationship between the price discrimination and an actual or reasonably probable injury to competition in the context of the factual situation involved."

21. In July of 1979, CL&P revised its E-35 rate. No evidence concerning the disparity between the R4 rate and the new E-35 rate was ever submitted by the plaintiffs. Thus, their evidence of disparity only goes to the five-month period between February when the R4 rate became effective and July when the E-35 rate was revised.

For the foregoing reasons I conclude that no substantial injury to competition occurred as the result of sales of power by defendants to industrial users located outside the geographical boundaries of the plaintiff towns.

IV.

Conclusion

Based upon the foregoing findings of fact and conclusions of law, judgment for the defendants on each of the counts in plaintiffs' complaint, together with usual costs, shall be entered.

So Ordered.

V.

Decision on the Counterclaim

At trial, defendants indicated on several occasions that they sought an award of counsel fees expended in connection with the defense of this matter. Such a request is not properly raised by way of a counterclaim and, to the extent that they rely on their counterclaim for that purpose, it is legally insufficient.

Nor are defendants entitled to an award of fees under the court's equitable powers. The Clayton Act's allowance of counsel fees in addition to treble damages, 15 U.S.C. § 15, is designed to encourage private litigation. *Cf. Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 265-66 (1972). There is nothing in that policy which supports an exception to the "American Rule," which does not allow successful

defendants to recoup their fees from the plaintiffs. *See Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 247 (1975).

While "attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons," *F.D. Rich Co., Inc.* v. *Industrial Lumber Co.,* 417 U.S. 116, 129 (1974); *Nemeroff* v. *Abelson,* 620 F.2d 339, 348 (2d Cir. 1980), such is not the case here. The defendants did present a convincing defense to the plaintiffs' claims, several of which had previously been litigated before the Commission. While this may have been duplicative, it was not, however, vexatious or frivolous. The plaintiffs made other claims on which the Commission had not squarely ruled as well. The fact that the defendants were able to settle with some of the original plaintiffs does not mean that these plaintiffs who pursued the lawsuit acted in bad faith, wantonly or for oppressive reasons.

Defendants also seek treble damages and attorneys' fees under the Clayton Act for alleged Sherman Act violations by the plaintiffs. They claim that the plaintiffs' joint participation in all of the negotiations and proceedings throughout the torturous history of their interactions was a section 1 conspiracy to boycott, harass and otherwise suppress competition in the electric power industry. While the plaintiffs fought on with indefatigable determination for more favorable rates in what turned out to be a losing case, that does not mean that their conduct was anticompetitive. I hold that it was not. Nor did any of the other evidence introduced at trial suggest that these plaintiffs

had been acting in violation of the Sherman Act.[22] Let judgment enter for the plaintiffs on the counterclaim.

So Ordered.

Dated at Hartford, Connecticut, this 26th day of August, 1980.

M. Joseph Blumenfeld
Senior United States District Judge

22. Defendants' claims under section 2 of the Sherman Act, 15 U.S.C. § 2, are likewise without merit.

FILED
JUN 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-2059

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal Corporations,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WHITNEY NORTH SEYMOUR
WILLIAM J. MANNING
Counsel for Petitioners
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Of Counsel:

SIMPSON THACHER & BARTLETT
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

LIVINGSTON, DILDINE, HAYNIE & YODER
425 Lincoln Bank Tower
Fort Wayne, Indiana 46802
(219) 423-9411

June 27, 1980

INDEX TO APPENDIX

	PAGE
Text of Constitutional Provision Relied On	1a
Text of Statutes Relied On	1a
Order and Judgment of the Court of Appeals (February 21, 1980)	5a
Opinion of the Court of Appeals (February 21, 1980)	6a
Order on Petition for Rehearing	38a
Judgment	40a
Judgment Order of District Court	42a
Memorandum Opinion of the District Court, January 30, 1979	47a
Finding of Facts and Conclusions of Law	105a
Order and Judgment of the Court of Appeals (August 16, 1977)	156a
Opinion of the Court of Appeals (August 17, 1977)	157a
Order and Memorandum of the District Court (May 1, 1975)	179a
Order of the District Court, October 22, 1976	200a
Stipulation of Facts	201a

Text of Constitutional Provision Relied On

Amendment I

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Text of Statutes Relied On

Federal Power Act §205, 16 U.S.C. §824d:

"§824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

"All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

"No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

"Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges,

together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

"Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five month period

"Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the

end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

Federal Power Act §206(a); 16 U.S.C. 824e(a):

"§824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

Sherman Act §2, 15 U.S.C. §2:

§2. Monopolizing trade a felony penalty

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a

corporation, or if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Clayton Act §4, 15 U.S.C. §15:

"§15. Suits by persons injured; amount of recovery

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act §15, 16 U.S.C. §26:

"§26. Injunctive relief for private parties; exception; costs

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff."

Order and Judgment of the Court of Appeals (February 21, 1980)

Opinion by Judge Wood

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 21, 1980

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. HUBERT L. WILL, Senior District Judge*

Nos. 79-1190, 79-1237, and 79-1354

CITY OF MISHAWAKA, INDIANA, CITY OF NILES, MICHIGAN, CITY OF COLUMBIA CITY, INDIANA, CITY OF BLUFFTON, INDIANA, CITY OF GARRETT, INDIANA, CITY OF GAS CITY, INDIANA, TOWN OF FRANKTON, INDIANA, TOWN OF WARREN, INDIANA, TOWN OF NEW CARLISLE, INDIANA, and TOWN OF AVILLA, INDIANA, Municipal Corporations,

Plaintiffs-Appellees, Cross-Appellants,

vs.

AMERICAN ELECTRIC POWER COMPANY, INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, and INDIANA & MICHIGAN ELECTRIC COMPANY, Corporations,

Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court for the Northern District of Indiana, South Bend Division

Nos. S-74-22, S-75-210, S-77-209

Allen Sharp, JUDGE

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART. The damage and injunctive provisions are VACATED and REMANDED for additional proceedings in accordance with the opinion of this court filed this date. Each party to bear its own costs.

* The Honorable Hubert L. Will, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

Opinion of the Court of Appeals (February 21, 1980)

CITY OF MISHAWAKA, INDIANA, CITY OF NILES, MICHIGAN, CITY OF COLUMBIA CITY, INDIANA, CITY OF BLUFFTON, INDIANA, CITY OF GARRETT, INDIANA, CITY OF GAS CITY, INDIANA, TOWN OF FRANKTON, INDIANA, TOWN OF WARREN, INDIANA, TOWN OF NEW CARLISLE, INDIANA, and TOWN OF AVILLA, INDIANA, Municipal Corporations,

Plaintiffs-Appellees and Cross-Appellants,

v.

AMERICAN ELECTRIC POWER COMPANY, INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, and INDIANA & MICHIGAN ELECTRIC COMPANY, Corporations,

Defendants-Appellants and Cross-Appellees.

Nos. 79-1190, 79-1237 and 79-1354.

United States Court of Appeals,
Seventh Circuit.

Argued June 6, 1979.

Decided Feb. 21, 1980.

Rehearing and Rehearing En Banc
Denied March 31, 1980.

Before SPRECHER and WOOD, Circuit Judges, and WILL, Senior District Judge.*

* The Honorable Hubert L. Will, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

Opinion of the Court of Appeals (February 21, 1980)

HARLINGTON WOOD, JR., Circuit Judge.[1]

Involved is the application of the Sherman Act[2] to a vertically integrated investor-owned electric utility, found by the trial court to be a monopoly. The utility's wholesale rates are subject to regulation by the Federal Energy Regulatory Commission[3] and its retail rates are subject to regulation either by the State Public Service Commission of Indiana in the instance of nine municipal plaintiffs or Michigan in the instance of one municipal plaintiff. The municipalities which own and operate local transmission systems for retail sale of electricity depend on defendants for their wholesale supply. Because the utility's wholesale rates charged the municipalities during the period 1976-1978 exceeded the retail rates charged to its own retail customers, the utility was found by the trial court to be guilty of a "price squeeze"[4] and of related exclusionary acts calculated to force the municipalities out of the retail electric business resulting in the conversion of municipal retail customers into retail customers of the utility. Triple damages were awarded based on rate overcharges and an injunction issued.[5] A cross appeal by the municipalities is also before us questioning the failure of the district court to award the municipalities their litigation expenses before the federal

1. Judge Will made substantial contributions to this opinion and in particular to the section on damages.

2. 15 U.S.C. § 2.

3. The Federal Energy Regulatory Commission was formerly known as the Federal Power Commission.

4. The term "price squeeze" as used in this context refers to a situation where the monopolist charges its wholesale customer a wholesale rate high enough to impede that customer's competition with the monopolist in the retail market.

5. The opinion of Judge Sharp is reported in *City of Mishawaka, Indiana v. American Electric Power Co.*, 465 F.Supp. 1320 (N.D.Ind. 1979), and is the subject of a recent Note, *Antitrust Price Squeeze*, 12 Ind.L.Rev. 637 (1979).

commission as an element of antitrust damages. Those commission proceedings involving these same parties considered related issues. This case in its preliminary stages was before us on interlocutory appeal.[6] In *Mishawaka I,* several issues were resolved. This court held that the utility was not immunized from Sherman Act attack and that the federal commission had neither exclusive nor primary jurisdiction over the utility faced with these antitrust charges. For the purposes of this case those issues are settled.

Although this case was well briefed and argued, it remains complex factually and legally.[7] Dual regulation, federal and state, of this electric utility, which is also subject to the Sherman Act, generates legal and practical problems in addition to electricity.[8] The necessary resolution by the courts of the involved complexities does not render a totally satisfying result. We shall first consider a capsule of the facts found by the district court, and then the various issues which arise.

---

6. *City of Mishawaka, Indiana v. Indiana & Michigan Electric Co.,* 560 F.2d 1314 (7th Cir. 1977), *cert. denied,* 436 U.S. 922, 98 S.Ct. 2274, 56 L.Ed.2d 765 (1978).

7. We have had the assistance of separate briefs filed by *amici curiae* Edison Electric Institute, Commonwealth Edison Company, and jointly by the cities of Anderson and Auburn, Indiana.

8. On the general subject of the application of antitrust laws to regulated industries the following articles may be of interest: Hale & Hale, *The Otter Tail Power Case: Regulation by Commission or Antitrust Laws,* 1973 Sup.Ct.Rev. 99; Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries,* 111 U.Pa.L.Rev. 46 (1962); Jones, *Marketing Strategy and Government Regulation in Dual Distribution Practices,* 34 Geo.Wash.L.Rev. 456 (1966); Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy,* 72 Colum.L.Rev. 64 (1972); Note, *Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination,* 58 Colum.L.Rev. 673 (1958); Note, *Refusals to Deal by Vertically Integrated Monopolists,* 87 Harv.L.Rev. 1720 (1974); Comment, *Otter Tail and Its Import for Regulated Utilities,* 9 Wake Forest L.Rev. 407 (1973).

THE FINDINGS OF THE TRIAL JUDGE

The bench trial lasted three and one-half days supplemented by a lengthy stipulation of facts, numerous depositions and over a thousand exhibits. Following trial the judge filed a Memorandum Opinion, Judgment Order, and Findings of Facts and Conclusions of Law. Those documents, and the Findings of Facts in particular, are attacked by the utility as the work product of the municipal attorneys and not the trial judge. It is therefore argued that a broader scope of review is justified than the clearly erroneous standard ordinarily applied pursuant to Rule 52, Federal Rules of Civil Procedure. We bear that legitimate concern in mind as we consider this case, but after a review of the whole record including pretrial and post trial matters, we see no necessity in the circumstances of this case to abandon our usual standard of review. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964).

Further, the utility argues that this is a "paper case" largely founded on the stipulation and other documents in evidence. A broader review standard is therefore urged upon us. *Yorke v. Thomas Iseri Produce Co.*, 418 F.2d 811, 814 (7th Cir. 1969). We more recently considered the prevailing rule in *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977). In applying a broader rule in that case we noted that the trial evidence consisted almost entirely of the testimony of a single witness whose credibility was not challenged. In the present case nine witnesses were heard including the managing officials of the utility during the times in question. The trial judge in his findings expressed "serious reservations" about the credibility of the utility officials. We cannot better judge the credibility of those witnesses unseen by us than the trial judge. Though the evidentiary documentation is volumi-

nous, we see no need in these circumstances to use that as an excuse to go behind the findings of the trial judge. The testimony of the witnesses and the inferences to be drawn had an obvious impact on the judge's decision. After review of the case we do not have a "definite and firm conviction" that the trial judge made erroneous findings.

However, in reaching the conclusion we do about this case, we do not mean to imply that it results only from a strict application of the "clearly erroneous" standard. We would much prefer to be assured that what we review is the work product resulting from the judge's personal consideration and resolution of the evidence in the case and that it is not merely the disguised product of the successful advocate. We also realize, however, that as a practical matter in these times a busy trial judge may in some circumstances be properly assisted with some of the paper work resulting from his own determination of the issues. This appears to be such a case.

FACTUAL BACKGROUND

The three related defendant companies will be considered as one for our purposes and referred to as the utility.[9] The utility generates, transmits and sells electricity at wholesale to the ten municipal plaintiffs, and also at retail to its own industrial, commercial and residential customers. The plaintiff municipalities may be considered for practical purposes as purchasing all of their wholesale electricity from the utility which in turn they individually distribute at retail to their own local customers through their electric

9. Indiana & Michigan Electric Company generates, transmits and sells electricity. American Electric Power Company, Inc., is an investor-owned public holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 *et seq.* American Electric Power Service Corporation, also a subsidiary of American Electric Power, provides management, professional and technical services to Indiana & Michigan Electric.

distribution systems. The wholesale rates charged by the utility are subject to federal regulation.[10] The wholesale rates filed by the utility become effective, subject to refund, thirty days after filing or after a maximum five-month suspension ordered by the federal commission. However, the retail rates sought by the utility in both Indiana and Michigan under the respective statutes of those states do not go into effect automatically prior to approval, but must await an order of the particular state commission fixing the rates.

In 1968, the municipalities individually entered into new full-requirements contracts with the utility for wholesale electricity. The utility during the period 1968-1978 filed for seven retail rate increases in Indiana, four in Michigan, and three federal requests for wholesale increases. The first of the three federal requests resulted in a refund to the municipalities settled by the utility for $1,678,511 plus about $300,000 interest. The latter two requests remain unresolved. Some of the state retail filings resulted in a degree of increase in retail rates. At least one state filing is undetermined.

As explained by the utility, it anticipated a future energy shortage, and therefore advised the municipalities that full-municipal requirements contracts would not be renewed. The municipalities were further advised to seek alternative sources of wholesale electricity which the utility offered to "wheel."[11] The utility has under development several nuclear generators. No municipality has yet been terminated by the utility.

The trial court found that the utility in its service area has a monopoly of retail sales of electricity as well as a monopoly of the supply of wholesale electric power upon

10. Federal Power Act, 16 U.S.C. § 824.

11. "Wheeling" is a convenient industry term for transmitting electricity from source to customer over the line facilities of a third party.

which the municipalities depend. Supported by the trial court's findings, the municipalities further point out that the utility and the municipalities are in competition for the right to serve all the customers in a municipality, referred to as "franchise competition." The municipalities claim that the utility has misused its monopoly power and the system of dual regulation. The trial court found that by seeking and permitting the wholesale rates to be higher and out of balance with lower retail rates, the utility was "price squeezing" the municipal systems into financial extinction and thereby was setting the stage for acquisition of municipal retail customers as its own. The trial court further found that the utility's rate program had been supplemented by threats to the continuation of wholesale power to the municipalities. Further the trial court found that competition had in the past been crippled and some municipal systems had been acquired by the utility.

The municipalities contend therefore that the utility has monopolized and attempted to monopolize the distribution and sale of electric power at retail in violation of Section 2 of the Sherman Act. The trial court found that to be the case and assessed treble damages in the amount of $12,148,-175.11 computed by using as a basis the excess of wholesale rates over retail rates. In addition to the money judgment, the utility was enjoined "from monopolizing or attempting to monopolize the distribution and sale of electric power," from applying any different standard of energy curtailment on the municipalities than it apples to its own retail customers, and from charging a wholesale rate in excess of its retail rates unless any disparity is first approved by the federal commission. Some of those background facts will be considered in more detail as the legal issues are individually examined.

APPLICABILITY OF *NOERR-PENNINGTON* DOCTRINE

The *Noerr-Pennington* doctrine is an outgrowth of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). It shields from the Sherman Act as a constitutionally protected right of petition a concerted effort to influence public officials, regardless of intent or purpose. Thus the utility argues that its wholesale rate filings with the federal commission are within its constitutional right of petition and therefore immune from the Sherman Act. It was said in *Noerr*, however, that there may be instances of "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S. at 144, 81 S.Ct. at 533. The "mere sham" exception standing alone does not apply to this case. The trial court did not find that the federal tariff filings were "mere sham," but found instead that the utility filed for the highest rate it thought it could justify without any regard for the adverse competitive impact the new wholesale rate would have on the utility's wholesale municipal customers in competition with the utility at retail. The trial court found that to be a violation of Section 205 of the Federal Power Act,[12] as interpreted in *Federal Power Commission v. Conway Corp.*, 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed.2d 626 (1976). *Conway* notes that Section 205(b) forbids a utility from granting any undue preference, subjecting anyone to any undue prejudice or disadvantage or maintaining any unreasonable differences in rates or service between classes of services. The federal commission was found to have jurisdiction to

12. 16 U.S.C. § 824d.

weigh and correct discriminatory effects in rate proceedings. There is a utility responsibility to avoid unreasonable differences in rates between classes of service.

In some contrast to that limited *Conway* finding is the trial court's broader view that all of the utility's acts and practices as a whole, its wholesale rate structure together with its statements threatening the power supply of the municipalities, its expressed preference in favor of its own retail customers and its policy of acquiring municipal distribution systems in distress, evidenced a specific intent to capitalize on and increase its monopoly power at the expense of the municipalities.

The *Noerr-Pennington* doctrine underwent some modification in *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). In that litigation between groups of competing highway carriers, it was charged that one group conspired to monopolize the transportation of goods by instituting various state and federal proceedings in agencies and courts to resist and defeat applications by the other group to acquire or transfer operating rights. The Court discusses the "sham" exception and its possible variations. The Court held that the conspirators sought not "to influence public officials," but to bar their competitors from meaningful participation in the decision-making process. *Id.* at 512, 92 S.Ct. at 612. The Court recognized that the allegedly conspiring group had a first amendment right of petition to be heard in agencies and courts in opposition to their competitors' applications, but that that right did not necessarily give the conspirators immunity from antitrust laws. The Court further noted that first amendment rights are not immunized from regulation when used to violate a valid statute. *Id.* at 514, 92 S.Ct. at 613. First amendment rights, the Court further explained, are not to be used as a means or pretext for achieving "substantive evils," and "[i]f the end result is

unlawful, it matters not that the means used in violation may be lawful." *Id.* at 515, 92 S.Ct. at 614.

> One claim . . . may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the fact-finder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz.*, effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'
>
> Petitioners, of course, have the right of access to the agencies and courts to be heard on application sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.

Id. at 513, 92 S.Ct. at 613.

In an opinion in which he concurred on other grounds, Justice Stewart, joined by Justice Brennan, declared the majority opinion in *California Motor Transport* to be a retreat from *Noerr*. *Id.* at 516, 92 S.Ct. at 614.

It appears to us that the municipalities are not barred by *Noerr-Pennington* in the particular circumstances. Were we to view it otherwise, the federal and state regulatory processes would provide the utility with a method of effectively advancing its illegal monopolistic purposes while maintaining an outward appearance of total innocence and shielded from the Sherman Act. The utility violated the Federal Power Act, at least by its own admission in failing to weigh in advance the discriminatory ef-

fects of its differences in wholesale and retail rates. The utility was able to set its own wholesale rates for lengthy periods of time without regulatory interference. Before a prior wholesale rate had been adjudicated, the utility would, during the intervening period, file a new and higher superseding wholesale tariff which likewise automatically went into effect before adjudication. Later, whenever the federal commission managed to review a prior outdated tariff, it was found to be excessive and was reduced. No utility wholesale tariff yet filed by the utility has avoided reduction by the federal commission. When federal regulation actually occurs, the abuse is mildly remedied by refunds. Meanwhile, the victim municipalities have been continually living with unregulated wholesale rates.

That continuing situation appears to us to be an abuse of the administrative process tending to produce, with the other conduct of the utility, an illegal result. As in *California Transport,* the municipalities as utility competitors are being denied effective access to timely consideration by the federal commission by the maneuverings of the utility. Fair and effective access to the regulatory process is vital to the existence of the municipal systems. The utility's actions, akin to those in *California Transport,* should not be permitted to "acquire immunity by seeking refuge under the umbrella of 'political expression.' " *Id.* at 513, 92 S.Ct. at 613. The utility cannot be heard to say that it does not know its wholesale rates will have an impact on the municipalities in their retail competition. The dual regulatory process is being taken undue advantage of by the utility, thwarting the intended balance of federal and state regulation.

The additional actions of the utility in threatening the continued future wholesale supply of the municipalities and expressing an intention to prefer its own retail customers over its wholesale municipal customers adds to the uncer-

tain plight of the municipal systems. That the utility threats were politely interlaced with unrealistic alternatives for sources of power suggested by the utility does not change their import. The evidence explored the possibilities of the municipalities avoiding the monopoly impact by constructing their own generating systems. It was found not to be economically feasible for the municipalities singly, nor even jointly to generate their own power in less than five years. Interconnecting and wheeling from other sources were considered, but no feasible municipal solution could be found. Utility monopoly power over the municipalities appears to be effective and complete. It is difficult to understand how the utility argument, which it advances in justification, that it would conserve its possibly scarce power by converting municipal retail customers into its own retail customers would remedy any power shortage.

The utility deserves no credit for originality in these maneuvers. One commentator notes that it is not an uncommon practice for a private electric company to refuse to sell bulk power to a municipally owned system because of competition from local distributing companies.[13] Another notes that a monopolist can evade regulation with ease by use of a "price squeeze."[14]

The utility in the past has shown some appetite for acquiring faltering municipal systems. The trial court in its opinion took note that the utility has had a policy of taking over municipal electric utilities and since 1957 had purchased or leased five in the area thereby converting municipal retail customers into its own.

Considering the combination of those utility activities this case is not precluded by *Noerr-Pennington.*

13. Comment, *supra* note 8, at 410.

14. Note, *Refusals to Deal by Vertically Integrated Monopolists, supra* note 8, at 1758.

THE "PRICE SQUEEZE" CHARGE

One of the principal issues of this case is the finding that the utility violated Section 2 of the Sherman Act by creating and maintaining a "price squeeze." The utility disputes the legal and factual basis for that determination. First, the utility charges the trial court left "price squeeze" undefined, but that even so there was no showing of a price squeeze or of an intent to create one. That the trial court did not specifically define "price squeeze" is not surprising as the parties used the term with familiarity throughout the proceedings, although they now differ about its application. The fault lies, if there is any, the utility argues, with the diverse regulatory procedures which preclude parity between wholesale and retail rates.

There is some substance to the utility regulatory argument. As we have already noted, the wholesale rates under federal control go into effect automatically without agency approval, but the state retail rates must await state approval. Behind the rate applications there are differing regulatory procedures, differing tests and standards to be applied, and differing accounting principles to be used in the computations. At best, a utility may find itself in a legal and practical maze, but for price squeezing the dual system also offers an obvious, ready made illegal opportunity with a legitimate gloss.

The utility strongly argues that no "price squeeze" intent was shown as the court relied on the wrong retail rates for comparison with wholesale rates to find a disparity. The trial court compared the rates, wholesale and retail, actually in effect under dual regulation at a particular time. The utility urges that the retail rates which should have been used for the analysis were the proposed retail rates which the utility was seeking from time to time pending state approval. If proposed retail rates had been used, the utility argues, the retail rates would have been in excess of

wholesale rates and the municipalities would have shown a net benefit. The proposed retail rates not in effect reflect its intent, the utility claims, not the actual rates subsequently fixed by the state. The trial judge looked at the approved retail rates actually in effect, not at what the utility claimed the rate should be in the future.

It is apparent from this case that a higher rate is oftentimes sought which cannot be justified. To ask for more than one actually expects to receive is not an uncommon technique, usually with the hope that, even when discounted, the final amount will be greater than what would have resulted from a more realistic initial request. We see no need to make possibly unrealistic rate requests even more useful to a utility by converting those requests into self-serving measurements of intent for price squeeze purposes.

The federal commission for its purposes, which to some extent are different than ours, has recently changed its view. In *Missouri Power Company,* FERC Opinion No. 31, 16 F.P.S. 5 265 (1978), the federal commission abandoned its prior holding in *Boston Edison Co.,* FPC Opinion No. 809 (1977), to the effect that the retail rate as filed could be used for comparison with the wholesale rate. *Missouri Power* holds that intent is irrelevant and that the retail rates actually in effect will be used for comparisons. The utility argues that the trial judge has done the same thing for antitrust purposes and in effect has held that intent is not a price squeeze necessity. We do not see the trial judge's decision that way. We are considering a "price squeeze" allegation, but that is not all we are considering. The "price squeeze" is only a part of the utility's conduct which as a whole was found to violate the Sherman Act.

In his findings, the trial judge found that the utility had never adopted a policy that its wholesale rate filings should be tailored to prevent its wholesale rates from being higher than its actual retail rates in effect. Further, the court

found that the utility offered no evidence to justify the disparity in wholesale and retail rates nor did the utility ever seek to lower wholesale rates to parity with retail rates. Moreover, the court found that the utility monitored the operations of its wholesale municipal customers and aggressively pursued acquisition of faltering municipal utilities. The utility recognized, the court found, that profitable and efficient municipal utilities did not represent likely prospects for purchase. The utility remains interested in acquisitions the court found. It also found that the utility was aware of the importance of rate comparisons by municipal voters considering the possible sale of their municipal utility. And, as might be expected, the court also found that the utility realized that its wholesale rates would inevitably affect the municipal retail rates.

The trial court determined that a Section 2 Sherman Act violation had been established when monopoly power was shown, even though lawfully acquired, along with only a general intent to abuse that power resulting in injury to the municipalities. *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *cert. denied*, 439 U.S. 822, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978). The utility argues, however, that to prevail the municipalities must establish "predatory" practices. The trial court went further, however, holding that even if specific intent were required, the evidence met that standard. The trial court inferred utility intent to impair plaintiffs' competitive ability and the desire to preserve and expand its own existing monopoly from a consideration of the evidence in its entirety, including in general the continuing wholesale and retail rate disparity, threats to the municipal wholesale power supplies, and the utility policy of acquisition of municipal systems.

In *Sargent-Welch*, we relied on *United States v. Griffith*, 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948). In *Griffith*, it was held that it is not always necessary to

find specific intent lest it crippled the Sherman Act. *Id.* at 105, 68 S.Ct. at 944. In the particular circumstances, however, of a regulated utility struggling with dual regulation, bearing in mind that the utility is entitled to recover its cost of service and to provide its investors with a reasonable rate of return, we believe that something more than general intent should be required to establish a Sherman Act violation. The utility charges that the trial court in fact read the requirement of any intent out of the Sherman Act. We disagree. The trial court discerned from a consideration of all the evidence of the utility's activities, not only a general intent which it considered to be adequate, but also a specific utility intent to serve its monopolistic purposes at municipal expense. We concur in that assessment of the evidence as a whole.

In this case, we are considering an industry subject to both federal and state regulation. However, we do not believe that that circumstance justifies an antitrust exemption on the basis that the utility is acting pursuant to mandates by a federal or state controlling body as urged by the utility in reliance on *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The evidence shows, the utility argues, that but for the state action in reducing the proposed retail rates there would have been no price squeeze. *Parker v. Brown* is inapposite. In that case a California producer of raisins brought suit in federal court to enjoin enforcement of a state agricultural proration program because it allegedly violated the federal antitrust laws. The Court assumed that the program would violate the Sherman Act if it were organized and operated by private persons, but held that the Sherman Act's purpose was not to restrain a state or its agents from activities directed by its own legislature. In contrast, it was pointed out, however, that a state cannot grant Sherman Act immunity by authorizing someone else to violate the Act, or by declaring other pre-

vious actions to be lawful. *Id.* at 351, 63 S.Ct. at 313. In the present case, Indiana and Michigan have not in any way attempted to create, approve or mandate a Sherman Act violation, nor has the federal agency. The utility has no basis to immunize its own activities with any *Parker v. Brown* type of exemption.

Among other things the court found that the utility unlawfully jeopardized the supply of municipal wholesale power. The utility attacks that finding on several grounds. The utility argues that it could not terminate wholesale service without the approval of the commission and it had never sought that approval. Nor did it have any obligation, it argues, to contract to supply municipalities with unlimited power in perpetuity. That those arguments may be factually correct does not change the impact of those utility warnings on the municipalities when considered in the context of all the evidence. There was no realistic substitute source of wholesale power for the municipalities to turn to. The utility warnings alone would not constitute an illegal act, but in the context of the whole case the utility threats may be seen in a different light. They appear to be another element of the utility's monopoly enhancement program. Similar warnings of power curtailment were not given by the utility to its own retail customers nor to municipalities which were not the utility's wholesale customers and in which the utility had retail customers. It was not shown how conversion of municipal retail customers to utility retail customers would conserve power. We see no need to set forth here in detail the evidentiary basis of the trial court's findings with which we are in accord.

OTHER LEGAL ISSUES

The municipalities had the burden of showing injurious anticompetitive conduct by the utility in violation of the Sherman Act in order to be entitled to treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15; *Peller v. International Boxing Club,* 227 F.2d 593 (7th Cir. 1955). The district court found that the utility and the municipal utilities competed for individual customers some of whom had the option of locating in the municipal area, or relocating outside the area, or expanding. The court likewise found some competition in adjacent areas where the customer might have a choice, and also in areas into which the municipal utility might expand. There was also evidence of competition for established customers of the utility within the municipal area. The competition which the court found most significant, however, was franchise competition, that is, that the utility competed to acquire or replace the municipal distribution systems so as to become the retail supplier of their customers. The evidence shows in varying degrees what the competition was for the various categories. The finding of franchise competition is based on a history of acquisitions and leases of municipal systems by the utility beginning in 1957. There were also utility attempts to acquire certain municipal systems and also interest expressed by the utility in acquiring others in the relevant service area extending into 1977. Those findings are disputed.

The utility argues that the takeovers were all approved and in the public interest. It was the trial court's view that the utility's use of the diverse rate regulation structure and its other acts contributed to a municipal system's vulnerability to utility takeover. Mere acquisition would not necessarily constitute a violation, but the violation was found to come from the anticompetitive practices of the utility as a whole which helped produce the acquisi-

tion opportunities. We believe the trial court was justified in coming to those conclusions based on the evidence and the reasonable inferences to be drawn therefrom.

The trial court found that competition had suffered antitrust injury in various ways. The municipalities had to increase their retail rates in some cases absorb portions of the increases without passing them on. Overall, the municipalities were impaired in their ability to offer competitive rates and service to present and potential customers, and, in addition, municipal citizens were deprived of the full benefits normally expected to be derived from the operation of their own facilities. The threats to power supply, it was found, inhibited growth and the attraction of new business ventures into their areas. We are not prepared to set those findings aside as clearly erroneous.

The utility would have us consider each separate aspect of its conduct separately and in a vacuum. If we did, we might agree with the utility that no one aspect standing alone is illegal. It is the mix of the various ingredients of utility behavior in a monopoly broth that produces the unsavory flavor. We have recognized previously that "[t]here are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under § 2 if done by a monopolist . . . ." *Sargent-Welch*, 567 F.2d at 711-12. Injury need not be conclusively shown, but the evidence must be sufficient to sustain the inference of injury to some extent. *Zenith Radio Corp v. Hazeltine Research, Inc.*, 395 U.S. 100, 114, 89 S.Ct. 1562, 1571, 23 L. Ed.2d 129 (1969). We believe that standard has been satisfied here. The possibility of refunds if the wholesale rate is determined to be too high is not a complete cure for the illegal activities of the utility.

DAMAGES

In awarding damages to the municipalities the trial court relied upon the analysis of monopolistic overcharges set forth in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 489, 88 S.Ct. 2224, 2229, 20 L.Ed.2d 1231 (1968), and found that the evidence established "two kinds" of monopolistic overcharges. First, the court found that the utility had charged the municipalities wholesale rates from 1972 to 1976 which were subsequently held to be unjust and unreasonable by the Federal Energy Regulatory Commission. Second, the court found that the municipalities had been overcharged by the amount the wholesale rates charged them exceeded the amounts which they would have been charged under the utility's retail rates actually in effect. The court proceeded to award damages based solely on a tripling of the difference between the higher wholesale rates paid by the municipalities and the lower retail rates which the utility actually charged its retail customers for the period from August 1976 through August 1978. Treble damages were found to exceed twelve million dollars. No other factor entered into the computation.

The formula used by the trial court is recommended by its simplicity, but the computation of damages should not be expected to be quite that much easier than the rest of this case. While the municipalities argue that there is no other way to determine their damages, we are not satisfied that this is true.

We recognize that the burden of proof of the municipalities as to the amount of damages is less than that required for proof of antitrust injury. It need not be precise. A just and reasonable estimate of damage based on relevant data may suffice even if also based upon probable or inferential proof. This standard does not, however, permit speculation or guesswork even though the defendant by its

own wrongdoing has made precision impossible. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. at 123-24, 89 S.Ct. at 1576-77; *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946).

The municipalities rely on *Hanover Shoe, supra,* both to support the trial court's findings of injury and also to establish a formula for determining the amount of the damages. Particularly, they rely, as did the trial court, on the following quotation from *Hanover Shoe*:

> [W]hen a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4.

392 U.S. at 489, 88 S.Ct. at 2229. In our view, *Hanover Shoe* is not fully applicable in either regard in the circumstances of this case, where the defendant is subject to dual regulation and any overcharge in wholesale rates later found to exist by the federal commission is to be refunded with 9% interest.

As an initial matter, assuming *arguendo* that the *Hanover Shoe* monopolistic overcharge analysis is fully applicable to the facts of this case, we find no justification for the trial court's determination that the difference between the wholesale rates in effect prior to commission review and the retail rates actually charged is an accurate measure of the overcharge. As we have already observed, the state and federal regulatory schemes to which the utility is subject utilize different accounting practices, as well as different formulae and criteria for determining what are fair and reasonable rates. Moreover, in all likelihood, the utility has dissimilar fixed and variable cost requirements which it must seek to cover in its respective wholesale and retail rates. Under these circumstances, we find the trial court's

apparent assumption that, absent the monopolistic overcharge, there would be equivalent wholesale and retail rates actually in effect and that the monopolistic overcharge was therefore the difference between the unreviewed higher wholesale rates and the approved retail rates to be totally without foundation.[15]

Assuming that an overcharge analysis is determinative of the measure of damages in this case, we conclude that the overcharge which the utility has received by its unilateral imposition of excessive wholesale rates prior to federal regulatory review is, more accurately, the amount which the federal commission ultimately orders refunded based on its determination that the wholesale rate charged was unreasonable and excessive. In recommending this method for calculating the overcharge, we recognize that the computation of antitrust damages is uniquely within the province of the federal courts.

Conceivably, we could remand this case to the district court for a determination of that portion of the utility's wholesale rate filings which is unreasonable and excessive. However, such a procedure might entail needless duplication of effort by the district court where the federal commission is both already in the process of making the identical determination and has substantially greater expertise in the area.

It is clear after *Conway*, moreover, that the federal commission is required to consider any anticompetitive price squeeze resulting from jurisdictional wholesale rates and non-jurisdictional retail rates in fixing rates for interstate

15. The apparent lack of foundation for this assumption is confirmed by the fact that for the period 1972-1976, after the utility's wholesale rates were reviewed by an ALJ for the federal commission and found to be excessive, the ultimate adjustment reached by the utility and the municipalities was such that the aggregate amount paid by the municipalities under the wholesale rates was substantially less than the amounts they would have paid under the utility's retail rates.

wholesale sales. Given these considerations, we would conclude that the commission's ultimate refund is the most accurate measure of the overcharge which the utility has been able to gather as a result of its unlawful activities.[16] On the other hand, if it does not desire to await a determination by the federal commission, the court might properly consider the overcharge which the commission found for the period 1972-1976 and endeavor to estimate the probable overcharge for the later period.

More fundamentally, however, we find the trial court's and the municipalities' reliance upon the *Hanover Shoe* overcharge analysis to be unsupportable in the instant case. In *Hanover Shoe,* a shoe manufacturer prevailed on its claim that its supplier, a manufacturer of shoe-making machinery, had monopolized the shoe machinery industry and that the policy of exclusively leasing, rather than selling, the machinery was an instrument of the monopolization. Damages were awarded on a tripling of the difference

16. In this court's earlier decision, we noted the possibility that a utility's retail rates might be set so low that the commission would be without authority to correspondingly set the jurisdictional wholesale rate sufficiently low to eliminate the price squeeze. 560 F.2d at 1323. This problem arises because the commission is without power to set wholesale rates below the lower boundary of the zone of reasonableness and has no authority over the retail rates. *Id.* at 1319. Assuming such possibility were present in this case, the ultimate refund awarded by the commission might not be equivalent to the utility's monopolistic overcharge.

There is no indication, however, that this is such a case. There is no suggestion that the utility deliberately depressed its retail rates to create a price squeeze; in fact, a substantial portion of the disparity between the utility's retail and wholesale rates apparently arises from the fact that the utility did not receive favorable consideration by the state commissions on several of its retail rate filings. Under such circumstances, we would have great difficulty concluding that the utility is to be held accountable for any "overcharge" in its wholesale rates beyond the refund awarded by the commission. Anticompetitive effects from this portion of the price squeeze, absent evidence that the utility deliberately depressed its retail rates, must be attributed to the state regulatory commissions and not to the utility.

between what the manufacturer had to pay in rentals and what it would have paid had its supplier been willing to sell the machines. The monopolistic "overcharge" in *Hanover Shoe* was recoverable solely because the plaintiff had successfully proven its antitrust charges: absent the antitrust action, the plaintiff would have continuously suffered the overcharge arising from the defendant's abuse of its monopolistic position.

Unlike *Hanover Shoe,* the utility here is not in a position to indefinitely retain the proceeds of any excessive wholesale charges. The commission is required by statute to determine whether the utility's filed wholesale rates are fair, just and reasonable. 16 U.S.C. § 824d(a). If it finds the filed wholesale rates to be excessive or unreasonable, the commission requires the utility to refund to its wholesale customers the exact amount which it has charged and collected in excess of that determined to be just and reasonable. These refunds include interest on the excess at the rate of 9%. Thus, the federal regulatory statute provides the municipalities with a system by which the utility's overcharges are automatically and necessarily restored to them with interest.

Given this federal regulatory system which is designed to curb the utility's abuse of its monopoly power and which guarantees ultimate restoration to the wholesale customers of the "overcharge" unlawfully extracted from them, we are not convinced that the utility's temporary monopolistic overcharge is an accurate measure of the antitrust damages which the municipalities have endured. Rather, under the *sui generis* circumstances of this case,[17] we believe that the

17. *Amici* Commonwealth Edison Co. and the Edison Electric Institute, relying primarily upon *ICC v. United States ex rel. Campbell,* 289 U.S. 385, 53 S.Ct. 607, 77 L.Ed. 1273 (1933), argued that this case should be analogized to a "price discrimination" rather than an "overcharge," and that antitrust damages should consequently be

(footnote continued on next page)

municipalities must establish their antitrust damages by proof of specific injuries they have suffered as a result of the utility's overcharges and other monopolistic practices.

This conclusion by no means narrowly limits the municipalities' ability to establish damages. Insofar as they have suffered injury in their "franchise competition" with the utility, the municipalities may be able to demonstrate, for example, that the 9% rate of interest fails to make them whole for the loss of the use of the monies which they were overcharged, or that the excessively high wholesale rates forced them to forego altogether or to secure less favorable terms for capital improvements to expand their municipal distribution facilities or to replace obsolete equipment, etc. Insofar as the municipalities have been injured in their ability to compete directly with the utility for the provision of service to retail customers in areas of overlapping service, the municipalities may be able to show a loss of customers, revenue and profits. Our discussion here is not meant to be exhaustive, but merely to illustrate that the

---

measured by the municipalities' business loss rather than by the difference between retail and wholesale prices. Review of the cases cited by *Amici*, however, provides scant guidance in the instant situation.

Campbell involved a shipper's effort to mandamus the Interstate Commerce Commission, where the Commission had refused to award the shipper damages in a situation where the shipper had paid rates determined by the Commission to be reasonable in amount but which, at the same time, were discriminatory. Under these circumstances, the Supreme Court distinguished between the damages arising from an overcharge and a discrimination: "When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of damages suffered by the shipper." 289 U.S. 389, 53 S.Ct. 609. Apart from the fact that *Campbell* did not arise under the antitrust laws, we do not find its analysis helpful here where the utility can (and did) unilaterally impose excessive wholesale rates, subject to future commission review and future refunds, in an effort to monopolize the distribution of power in its service area.

No case cited by either party or any amicus provides substantial insight into how antitrust damages should be measured in this context of dual regulation of the utility's wholesale and retail rates.

municipalities on remand must introduce proof of damages which were caused by the utility's monopolistic conduct.

We also find that the municipalities are entitled to recover, as part of their antitrust damages, the expenses they incurred in litigating before the commission in their attempt to prevent the utility's withdrawal of their wholesale supply as had been threatened. The litigation expenses sought are not for opposing utility rate applications. In the context of this antitrust violation, we do not believe that to allow litigation expenses to the municipalities for efforts to counteract the threats and to protect their municipal systems runs afoul of *Noerr-Pennington* as claimed by the utility. It was not the utility petitioning for its own lawful purposes. It was the municipalities petitioning to prevent the utility's allegedly unlawful conduct.

Support for our award of these litigation expenses as a portion of antitrust damages may be found in this court's earlier decisions awarding litigation expenses undertaken in defense of patent infringement litigation as an element of antitrust damages. In *Dairy Foods, Inc. v. Dairy Maid Products Cooperative,* 297 F.2d 805, 808-09 (7th Cir. 1961), we held that, where a patent "infringement suit was brought as part of and in furtherance of a combination and conspiracy which violates the antitrust laws and results in injury" such that the defendant was put to the choice of (1) foregoing use of the patented device, (2) accepting a discriminatory and restrictive license which increased the cost of production, or (3) defending expensive patent litigation, the cost and expense of defending the suit was a component of antitrust damages which could be trebled. *See also Locklin v. Day-Glo Color Corp.,* 429 F.2d 873, 878 & n. 13 (7th Cir. 1970), *cert. denied,* 400 U.S. 1020, 91 S.Ct. 582, 27 L.Ed.2d 632 (1971); *Hazeltine Research, Inc. v. Zenith Radio Corp., Inc.,* 388 F.2d 25, 35 (7th Cir. 1967), *aff'd in part and rev'd in part,* 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

Similarly, in this case, the trial court found that the municipalities had no choice but to file an administrative action before the commission to prevent the loss of their wholesale power source and to establish their right to equal treatment with the utility's retail customers whom the utility had indicated would receive preferences. Under these circumstances, we find no merit in the utility's contention that the cases discussed above should be narrowly limited to situations where the prevailing antitrust plaintiff had been forced to defend patent infringement litigation.

Accordingly, we vacate the award of damages and remand to the district court for such further proceedings as may be necessary to determine the municipalities' damages. Whereas the trial court earlier found damages with reference only to the period from August 1976 through August 1978, on remand the court may consider damages suffered during the period covered by the complaint in which the utility's unlawful activities occurred. On remand, the court shall also consider whether any portion of the municipalities' damages is barred as a result of the negotiated settlement reached by the municipalities and the utility with respect to the utility's wholesale rate schedule for the period from January 13, 1973 to July 27, 1976.

INJUNCTIVE RELIEF

In *Mishawaka I*, we anticipated the injunctive relief permitted under Section 16 of the Clayton Act, 15 U.S.C. § 26, provided it would not interfere with rates approved by the commission, cause conflict or preempt commission jurisdiction. That is not an easy task. The courts should not be in the rate fixing business. The court, however, is faced with indefinitely permitting a price squeeze or trying to cause some adjustment of the rates. As was argued in *Mishawaka I*, delay to determine what rates may be finally approved

by the commission may only result in authorizing "refunds to a corpse." Even though the commission cannot afford complete antitrust relief, we repeat our expressed thoughts in *Mishawaka I* that though a stay of further proceedings need not be granted, the district court remains free to determine anew, in view of the substantial amount of time which has now passed in this litigation, whether or not in the immediate circumstances it may be beneficial to await and ascertain particular commission action in order to decide the exact scope of antitrust damages, or for other purposes.

The trial court in its Judgment Order enjoined the utility in various respects to which the utility objects.[18] The in-

18. The Judgment Order in pertinent part provides:

2. Defendants American Electric Power Company, Inc., American Electric Power Service Corporation, and Indiana & Michigan Electric Company, their officers, agents, successors and all persons acting in concert with them are hereby enjoined from monopolizing or attempting to monopolize the distribution and sale of electric power at retail within defendant I&M's service area or within any of the plaintiff municipalities, in violation of 15 U.S.C. § 2.

3. Defendant Indiana & Michigan Electric Company, its officers, agents, successors and all persons acting in concert with it, are hereby enjoined from discriminating against I&M's wholesale municipal customers in rates, terms, or conditions of service; from taking any action that will have the effect of singling out I&M's wholesale municipal customers for the purpose of indicating directly or indirectly that the continuity of service for only that class of customers may be in jeopardy or that the supply of electric power and energy to those municipal utilities and their customers may be curtailed on different terms from those applied to I&M's retail customers; and from failing to perform I&M's obligation to serve each of the plaintiffs, as well as its other customers, fairly, equitably and on a nondiscriminatory basis as long as I&M conducts a public utility business in their area.

4. Defendants American Electric Power Company, Inc., and American Electric Power Service Corporation, their officers, agents, successors and all persons acting in concert with them,

(footnote continued on next page)

junction was drafted by municipal counsel and issued by the trial court without the benefit of a hearing as to its nature and scope. Particularly in the circumstances of this case we believe a hearing would have been beneficial.

We agree with the utility that paragraph 2 of the injunction is too vague to identify any specific activity which may be subject to the contempt power. Paragraph 2 merely incorporates the broad language of Section 2 of the Sherman Act. Rule 65(d), Fed.R.Civ.P., provides that every injunction shall be specific in its terms and shall describe in reasonable detail the acts sought to be restrained. The standard established by Rule 65(d) "is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is

---

are hereby enjoined from discriminating or causing I&M to discriminate against I&M's wholesale municipal customers in rates, terms, or conditions of service; from taking any action that will have the effect of singling out I&M's wholesale municipal customers for the purpose of indicating directly or indirectly that the continuity of service for only that class of customers may be in jeopardy or that the supply of electric power and energy to those municipal utilities and their customers may be curtailed on different terms from those applied to I&M's performance of its obligation to serve each of the plaintiffs, as well as I&M's other customers, fairly, equitably and on a nondiscriminatory basis as long as I&M conducts a public utility business in their area.

5. In preparing and filing new wholesale rates for electric service to any of the plaintiff municipalities, the defendants (1) shall project the billing determinants for each plaintiff for the first year the new wholesale rate will be in effect, as requested by I&M's wholesale rate filing, and (2) shall compare the projected billings to each plaintiff under the proposed wholesale rate against the amount that plaintiff would pay under I&M's retail rates in effect at the time the wholesale rate is filed. The defendant I&M is enjoined from putting into effect or charging any of the plaintiffs a wholesale rate under which the projected billings to any plaintiff exceed the amount that plaintiff would pay under I&M's retail rates in effect at the time the wholesale rate is filed, unless and until the Federal Energy Regulatory Commission determines that that wholesale rate is just and reasonable.

proscribed." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2955 at 536-37 (1973). To enjoin in the language of the Sherman Act obviously fails to meet that test.

This litigation demonstrates the difficulties of simply applying Sherman Act language to particular circumstances. We also agree that portions of paragraphs 3 and 4 of the injunction are properly subject to similar objections. It would be difficult to ascertain in advance, for example, what conduct is proscribed in paragraphs 3 and 4 by the requirement that the utility treat all its customers fairly, equitably and on a nondiscriminatory basis.

Paragraph 5 is attacked as being in conflict with Section 205 of the Federal Power Act governing rates and charges, as an intrusion by the court into the rate making process and also as being vague in some of its requirements. The thrust of paragraph 5 seems to be to impose certain requirements for new filings and in the meantime to roll back wholesale rates to the same level as the retail rates in effect. Rolling back the present wholesale rate may be seen as some temporary improvement in the rate structure, but unfortunately it is not the result of a knowledgeable effort to tailor the rates to bring them within some zone of reasonableness to achieve fair wholesale and retail competition. *See Federal Power Commission v. Conway Corp.*, 426 U.S. at 278, 96 S.Ct. at 2004. To set wholesale rates and retail rates at the same level for an extended length of time ignores the economic justification for the recognized distinction between wholesale and retail. On a short term interim basis to do so may alleviate, but will not solve the problem. Also, it may be, given the differing characteristics of the various regulating bodies, that for some reasonable time some excess of wholesale rates over retail rates may be justified in order for the utility to be able to achieve a proper rate balance through the normal functioning of the regulating bodies. We believe more flexibility is required in the order so as to permit the utility an

opportunity to justify some short term variations. To require the utility to comply indefinitely with paragraph 5 of the injunction prohibiting it from charging a wholesale rate not actually approved by the federal commission amends the Federal Power Act. It is only the antitrust violation found to exist in this case from a combination of circumstances which justifies temporary control of the wholesale rates by the court. When, however, assuming the absence of other anticompetitive activities, the utility demonstrates a good faith effort to comply with its *Conway* obligations so as to avoid anticompetitive effects, the court should return rate control to the regulating commissions established respectively by Congress and the state legislatures for that purpose.

It may also be feasible to require the parties to seek expedited consideration of the rate filings from the federal commission and state agencies in view of the existing serious antitrust complications found to exist in the combination of circumstances in this case. Even though Sherman Act jurisdiction lies with the court, there is no prohibition against a common expedited effort by the parties and the other governmental agencies to cooperate and assist each other in an expeditious resolution of these mutual problems. Although the federal and state commissions are not parties to this litigation the court may require those who are parties to seek to bring together cooperative federal and state consideration and solution of these rate problems. The Federal Power Act makes it clear that the federal commission is not expected to function in isolation. Section 209(b), 16 U.S.C. § 824h(b), allows federal and state commission cooperation with regard to rate structures and other matters. Other sections of the Act also anticipate a working federal-state relationship.[19] *Conway Corp. v. Fed-*

19. For example, section 311, 16 U.S.C. § 825j, pertains to investigations of matters, in this case retail rates, not subject to federal jurisdiction, and section 202(a), 16 U.S.C. § 824a(a), provides for notice to state commissioners.

eral Power Commission, 167 U.S.App.D.C. 43, 51, 510 F.2d 1264, 1272 (D.C.Cir. 1975), *aff'd*, 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed.2d 626 (1976). It may be, pending some congressional or legislative adjustment in procedures, that only through an expeditious and cooperative effort by the federal and state agencies to apply their expertise to this type of problem will the present regulatory systems have any reasonable chance of success.

The injunction is vacated and upon remand the trial court may, after hearing, devise a more specific injunction being careful not to encroach any further on the rate making process than may be temporarily required by antitrust considerations. As we have already noted, the injunction was issued by the trial court without the benefit of a hearing. Therefore the ramifications and complications of the injunction are not explored in the record. We believe a hearing on the injunction will be most helpful to the trial court. We do not intend to inhibit or confine the trial court merely to some modification of the present injunction. It is expected that a new effort be made to fashion a suitable injunction in keeping with the general principles expressed in *Mishawaka I* and in this opinion.

The trial court is affirmed in part. The damage and injunctive provisions are vacated and remanded for additional proceedings in conformity with this opinion. The parties shall bear their own costs of this appeal.

Order on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

March 31, 1980

Before:

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. HUBERT L. WILL, Senior District Judge*

Nos. 79-1190, 79-1237 and 79-1354

CITY OF MISHAWAKA, INDIANA, *et al.*,
Plaintiffs-Appellees and Cross-Appellants,

vs.

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,
Defendants-Appellants and Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Indiana,
South Bend Division.

Nos. S-74-22, S-75-210, S-77-209

ALLEN SHARP, *Judge.*

---

* The Honorable Hubert L. Will, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

Order on Petition for Rehearing

On consideration of the petition for rehearing and suggestion for rehearing, *in banc* filed in the above-entitled cause by counsel for the defendants-appellants, no judge in active service has requested a vote thereon,* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* Judge Richard D. Cudahy disqualified himself from any consideration of the petition for rehearing *in banc* filed in the above case.

Judgment

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

Consolidated Civil Action Numbers S74-72, S75-210, S77-209

CITY OF MISHAWAKA, IND., CITY OF NILES, MICH., CITY OF COLUMBIA CITY, IND., CITY OF BLUFFTON, IND., CITY OF GARRETT, IND., CITY OF GAS CITY, IND., TOWN OF FRANKTON, IND., TOWN OF WARREN, IND., TOWN OF NEW CARLISLE, IND., and TOWN OF AVILLA, IND.

v.

AMERICAN ELECTRIC POWER COMPANY, INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, and INDIANA & MICHIGAN ELECTRIC COMPANY,

---

This action came on for trial before the Court, Honorable Allen Sharp, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged the Plaintiffs, Cities of Mishawaka, Ind., Niles, Mich., Columbia City, Ind., Bluffton, Ind., Garrett, Ind., Gas City, Ind., and Towns of Frankton, Ind., Warren, Ind., New Carlisle, Ind., and Avilla, Ind., recover of the Defendants American Electric Power Company, Inc., American Electric Power Service Corporation, and Indiana & Michigan Electric Company, the sum of

$12,148,175.91, with each of the named municipalities receiving the specific amount set forth in the Judgment Order, in addition to the Injunctive Relief GRANTED, and the recovery of costs by each of the Plaintiffs, including reasonable attorney fees in this case, all in accordance with and as more specifically set forth in the Judgment Order of this Court ENTERED this date, and

It Is Further Ordered and Adjudged that the defendant Indiana & Michigan Electric Company take nothing by its First, Second, Third, Fourth or Fifth Counterclaims, and that its Counterclaims be DISMISSED on the merits.

Dated at South Bend, Indiana, this 30th day of January, 1979.

RICHARD E. TIMMONS

Clerk of Court

by EUGENE J. SZYNSKI

Eugene J. Szynski
Deputy

Judgment Order of District Court

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Consolidated Civil Action Numbers S74-72, S75-210, S77-209

CITY OF MISHAWAKA, INDIANA
CITY OF NILES, MICHIGAN
CITY OF COLUMBIA CITY, INDIANA
CITY OF BLUFFTON, INDIANA
CITY OF GARRETT, INDIANA
CITY OF GAS CITY, INDIANA
TOWN OF FRANKTON, INDIANA
TOWN OF WARREN, INDIANA
TOWN OF NEW CARLISLE, INDIANA
and TOWN OF AVILLA, INDIANA,
Municipal corporations,

Plaintiffs,

v.

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Defendants.

Pursuant to the Findings of Fact and Conclusions of Law entered this date,

Judgment Order of District Court

IT IS HEREBY DECLARED, ORDERED, ADJUDGED AND DECREED:

1. That defendants American Electric Power Company, Inc., American Electric Power Service Corporation, and Indiana & Michigan Electric Company, and each of them, have violated 15 U.S.C. Section 2 by monopolizing and attempting to monopolize the distribution and sale of electric power at retail within defendant I&M's service area and in the plaintiff municipalities.

2. Defendants American Electric Power Company, Inc., American Electric Power Service Corporation, and Indiana & Michigan Electric Company, their officers, agents, successors and all persons acting in concert with them are hereby enjoined from monopolizing or attempting to monopolize the distribution and sale of electric power at retail within defendant I&M's service area or within any of the plaintiff municipalities, in violation of 15 U.S.C. Section 2.

3. Defendant Indiana & Michigan Electric Company, its officers, agents, successors and all persons acting in concert with it, are hereby enjoined from discriminating against I&M's wholesale municipal customers in rates, terms, or conditions of service; from taking any action that will have the effect of singling out I&M's wholesale municipal customers for the purpose of indicating directly or indirectly that the continuity of service for only that class of customers may be in jeopardy or that the supply of electric power and energy to those municipal utilities and their customers may be curtailed on different terms from those applied to I&M's retail customers; and from failing to perform I&M's obligation to serve each of the plaintiffs, as well as its other customers, fairly, equitably and on a nondiscriminatory basis as long as I&M conducts a public utility business in their area.

4. Defendants American Electric Power Company, Inc., and American Electric Power Service Corporation, their officers, agents, successors and all persons acting in concert with them, are hereby enjoined from discriminating or causing I&M to discriminate against I&M's wholesale municipal customers in rates, terms, or conditions of service; from taking any action that will have the effect of singling out I&M's wholesale municipal customers for the purpose of indicating directly or indirectly that the continuity of service for only that class of customers may be in jeopardy or that the supply of electric power and energy to those municipal utilities and their customers may be curtailed on different terms from those applied to I&M's direct retail customers; and from interfering with or preventing I&M's performance of its obligation to serve each of the plaintiffs, as well as I&M's other customers, fairly, equitably and on a nondiscriminatory basis as long as I&M conducts a public utility business in their area.

5. In preparing and filing new wholesale rates for electric service to any of the plaintiff municipalities, the defendants (1) shall project the billing determinants for each plaintiff for the first year the new wholesale rate will be in effect, as requested by I&M's wholesale rate filing, and (2) shall compare the projected billings to each plaintiff under the proposed wholesale rate against the amount that plaintiff would pay under I&M's retail rates in effect at the time the wholesale rate is filed. The defendant I&M is enjoined from putting into effect or charging any of the plaintiffs a wholesale rate under which the projected billings to any plaintiff exceed the amount that plaintiff would pay under I&M's retail rates in effect at the time the wholesale rate is filed, unless and until the Federal Energy Regulatory Commission determines that that wholesale rate is just and reasonable.

6. Each of the plaintiffs, City of Mishawaka, City of Niles, City of Columbia City, City of Bluffton, City of Garrett, City of Gas City, Town of Frankton, Town of Warren, Town of New Carlisle, and Town of Avilla recover of the defendants American Electric Power Company, Inc., American Electric Power Service Corporation, Indiana & Michigan Electric Company, and each of them, the following amount, being treble the amount by which I&M's wholesale charges to that plaintiff during the period August 1, 1976, through August 31, 1978 exceeded the amount the plaintiff would have paid under I&M's retail rates then in effect:

Avilla	$ 50,416.50
Bluffton	$ 1,937,155.95
Columbia City	$ 1,934,730.93
Frankton	$ 243,826.14
Garrett	$ 635,690.46
Gas City	$ 611,686.26
Mishawaka	$ 4,027,529.67
New Carlisle	$ 103,807.47
Niles	$ 2,432,480.31
Warren	$ 170,852.22
TOTAL	$12,148,175.91

7. The plaintiffs have sustained their burden of proof with those elements of a claim under Section 2 of the Sherman Act as defined by the Court of Appeals *in this case,* in *City of Mishawaka, Indiana et al v. Indiana & Michigan Electric Company et al,* 560 F. 2d 1314 (7th Cir. 1977), cert. den. 98 S. Ct. 2274 (1978).

8. IT IS FURTHER ORDERED AND ADJUDGED that the defendant Indiana & Michigan Electric Company take nothing by its First, Second, Third, Fourth or Fifth Counterclaims, and that its Counterclaims be dismissed on the merits.

9. Each of the plaintiffs is entitled to recover of the defendants its costs of suit, including reasonable attorney fees in this case. In regard to costs and attorney fees, the plaintiffs shall file full and complete affidavits in regard to the same no later than March 5, 1979, to which the defendants shall respond no later than April 15, 1979.

Enter January 30, 1979.

/s/ ALLEN SHARP

JUDGE, UNITED STATES DISTRICT COURT

Memorandum Opinion of the District Court, January 30, 1979

CITY OF MISHAWAKA, INDIANA, CITY OF NILES, MICHIGAN, CITY OF COLUMBIA CITY, INDIANA, CITY OF BLUFFTON, INDIANA, CITY OF GARRETT, INDIANA, CITY OF GAS CITY, INDIANA, TOWN OF FRANKTON, INDIANA, TOWN OF WARREN, INDIANA, TOWN OF NEW CARLISLE, INDIANA, and TOWN OF AVILLA, INDIANA, Municipal Corporations,

Plaintiffs,

v.

AMERICAN ELECTRIC POWER COMPANY, INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, and INDIANA & MICHIGAN ELECTRIC COMPANY, Corporations,

Defendants.

Nos. S 74-72, S 75-210 and S 77-209.

United States District Court,

N. D. Indiana,

South Bend Division.

Jan. 30, 1979.

Thomas Ewald, Washington, D. C., James J. Olson, Mishawaka, Ind., Theodore L. Bendall, Huntington, Ind., Edward A. Chapleau, South Bend, Ind., Gerald M. Stern and David R. Boyd, Washington, D. C., James R. Fleck,

Columbia City, Ind., John M. Rigby, Niles, Mich., for plaintiffs.

Thomas W. Yoder, Fort Wayne, Ind., Peter J. Schlesinger, Dennis G. Jacobs, Lawrence A. Levy, Kenneth R. Logan, Blair C. Fensterstock, and Kathleen Schaaf, New York City, for defendants.

MEMORANDUM OPINION

ALLEN SHARP, District Judge.

This will state the legal basis for the separately entered findings of fact and conclusions of law.

Plaintiffs are ten municipalities that operate their own electric utilities pursuant to State statutory authority. Each is located within the service area of defendant Indiana & Michigan Electric Company and each purchases its bulk electric power requirements from I & M. The evidence shows that I & M has a monopoly of retail sales of electric power within its service area, and that the company also controls the supply of electric power to all of the plaintiff municipalities while competing against their municipal electrical utilities for the right to serve all consumers within their corporate limits. I & M and the plaintiffs also compete for the right to serve individual customers located in or near each town or who might choose to locate either in the town or elsewhere in I & M's area.

The rates the plaintiffs pay I & M for electric service are the wholesale rates unilaterally set by the defendants in I & M's filings before the Federal Energy Regulatory Commission. Under the Federal Power Act, as interpreted by the Supreme Court and the Federal Energy Regulatory Commission, in filing new wholesale rates, I & M must compare those rates against its retail rates, consider their possible anticompetitive impact, and not require any of

the plaintiffs to pay more at wholesale than it would pay under I & M's retail rates then in effect without justifying the higher wholesale rates. Defendants have ignored this obligation. Since July 1976, defendants I & M and American Electric Power Service Corporation have unilaterally and without justification filed new wholesale rates that have required the plaintiff municipalities to pay over $4 million more than they would have paid under I & M's retail rates then in effect. The evidence shows that the defendants made no attempt to compare their wholesale and retail rates, much less to consider the possible anticompetitive impact of that relationship and try to avoid or at least justify these anticompetitive consequences. All three defendants—I & M, the Service Corporation, and their parent, American Electric Power Company, Inc.—have cast doubt on the continuity of plaintiffs' future supply of electric power by attempting to withdraw from the wholesale market and by seeking to impose time limits on I & M's obligation to serve plaintiffs and restrictions on the quantity of power they may purchase at current rates. Defendants I & M and Service Corporation also have filed and I & M has charged unjust and unreasonable rates which required the plaintiffs to pay over $1,600,000 in excess of reasonable rates for the period 1973-1976 and required the Cities of Niles and Columbia City to pay a total of over $285,000 more than they would have paid under I & M's retail rates in effect during that same period. These practices are designed to promote defendants' policy of taking over utilities operated by municipalities.

Plaintiffs' consolidated complaint seeks relief from defendants' monopolization of the sale of retail electric power within I & M's service area and in each of the plaintiff municipalities, in violation of Section 2 of the Sherman Act. The evidence clearly shows that I & M has monopoly power, and that the defendants' anticompetitive acts tend to

exclude the plaintiff municipalities from the electric utility business. Damages and injunctive relief are necessary and appropriate.

In order to establish a violation of the monopolization provision of Section 2, plaintiffs must demonstrate "the existence of monopoly power, whether lawfully or unlawfully acquired, and the general intent to abuse that power." *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 709 (7th Cir. 1977), cert. den. —— U.S. ——, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978) (Citations omitted). "A specific intent to monopolize need not be shown to establish the offense of monopolization when the monopolist undertakes anticompetitive actions." *Id.* at 711 (Citations omitted). Nor is it necessary to establish that these anticompetitive actions are "predatory" in nature.

In order to recover damages under Section 4 of the Clayton Act, the antitrust plaintiff must demonstrate that he has been injured in his business or property. Id. at 709; see 15 U.S.C. § 15. To obtain an injunction under Section 16 of the Clayton Act, however, the plaintiff need only demonstrate "threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . ." 15 U.S.C. § 26.

I.

The Court's initial determination of the issue of monopoly power controls the standards to be applied thereafter. Where monopoly power is found to exist, a defendant's conduct is assessed in accordance with the monopolization provision of Section 2. If monopoly power is not proved, a plaintiff must satisfy the more rigorous proof requirements of the attempt to monopolize provision of Section 2.

Memorandum Opinion of the District Court, January 30, 1979

The record demonstrates that defendants possess monopoly power in two respects. First, through defendant I & M, they presently have a monopoly of the retail sales of electricity in the geographic market occupied by I & M. I & M's only competition in that market comes from the plaintiffs and I & M's other wholesale customers. Second, defendants also have a monopoly of the supply of electric power and energy on which the plaintiffs depend to serve their customers and to compete with I & M for retail sales. Establishment of either monopoly brings the monopolization provision of Section 2 into operation.

It is clear that the relevant product market is electric power and energy. There is no substitute for electric power which might be acceptable to industrial, commercial, and residential consumers in Northern Indiana and Southwestern Michigan. Defendants have offered no evidence suggesting that sufficient interchangeability exists between electricity and other forms of power and energy even to give rise to an issue on this point.

Assessment of defendants' monopoly in retail sale of electric power and energy involves definition of the geographic market. In determining the relevant market, the Court must "delineate markets which conform to areas of effective competition and to the realities of competitive practice." *Sargent-Welch, supra,* 567 F.2d at 710, quoting *L. G. Balfour Co. v. F. T. C.,* 442 F.2d 1, 11 (7th Cir. 1971). Applying this practical approach to the geographic market in this case is relatively simple. As one very distinguished commentator has observed:

> "The geographic location of the market is usually determined by an examination of the areas in which the particular firm actually competes or operates. If it concentrates its sales and service in one area, this area will normally be the relevant market." E. Kintner *An*

Antitrust Primer, A Guide to Antitrust And Trade Regulation Laws For Businessmen, pp. 102-103 (2d Ed. 1973).

Here, defendant I & M has a clearly defined service area in Indiana and Michigan within which it sells electric power and energy at retail pursuant to franchises granted by the municipalities and townships. I & M has tariffs on file for those areas in the Public Service Commissions of Indiana and Michigan, pursuant to which it offers to sell electricity at retail to all interested buyers. Moreover, as the defendants have stated, no other public utility is allowed to sell electric energy at retail within this area.

Using the method for identifying the nature and control of the relevant market approved and relied on by the Supreme Court of the United States in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 370, 93 S.Ct. 1022, 1026, 35 L.Ed.2d 359 (1973), the evidence indicated that I & M serves 89% of the municipalities and townships located within its service area directly at retail. The remaining 11% are served at retail by the plaintiffs and by other municipal wholesale customers of I & M. Defendants' share of the relevant market in this case is comparable to the 91% share found to constitute a monopoly by the Supreme Court of the United States in *Otter Tail, id.*, and is substantially greater than the 75.6% that the District Court in *Otter Tail* deemed sufficient to support a conclusion of monopoly power. *United States v. Otter Tail Power Co.*, 331 F.Supp. 54, 59 (D.Minn. 1971), aff'd 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

Defendants' monopoly of retail sales within the geographic market is equally clear when measured in terms of the amount of electric power and energy sold there. The evidence shows that I & M made 85% of all the retail sales made by public utilities and municipalities in the relevant

geographic market in the year 1977, and 80% of all retail sales if the retail sales of the seven rural electric cooperatives that purchase all of their power at wholesale are included.

By either standard, I & M possesses a monopoly in the retail sales of electric power within the geographic market in which it operates. These percentages are comparable to the 90% figure found to constitute a monopoly in *Sargent-Welch, supra,* 567 F.2d at 709, in addition to being far in excess of that found sufficient to give rise to a finding of monopoly power by the *Otter Tail* District Court. Other courts likewise have found monopoly power based on market concentrations of a comparable or smaller nature. See, *e.g., United States* v. *Grinnell Corp.,* 384 U.S. 570, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966) (Defendant's control of 87% of the accredited central station service business "leaves no doubt that the congeries of these defendants have monopoly power").

The evidence shows that each of the plaintiffs depends on I & M for between 95% to 100% of its bulk power supply of electric power and energy for its own use and for resale to its customers. Though the law imposes no obligation on the plaintiffs to build new generation facilities, to go into the business of generating electric power, or to build new transmission lines to other utility companies in an effort to resist defendants' monopolization, the evidence shows that plaintiffs cannot become independent of I & M within any reasonable time by any of those methods. Demonstration of the defendants' complete monopoly of plaintiffs' source of supply is—standing alone—sufficient to require the invocation of the monopolization standards of Section 2.

The fact that the electric utility industry is a "highly regulated industry critical to the Nation's welfare makes the play of competition not less important but more so."

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372, 83 S.Ct. 1715, 1746, 10 L.Ed.2d 915 (1963). The plaintiffs compete with I & M in a number of ways.

Plaintiffs and I & M compete for retail sales in the relevant geographic market. Because no other public utility can engage in retail sales of electricity within I & M's franchised service area, the plaintiffs and I & M's other wholesale customers offer the only source of effective competition for retail sales within this market.

I & M also is in competition with each of the plaintiffs for all the customers presently served by the plaintiffs' municipal utilities. The decision by the voters of any of the plaintiffs to discontinue operating their municipal utility inevitably will result in I & M's serving all those customers directly at retail. That has been the experience of the municipalities that have sold their utilities to I & M since 1957. And, as Theodore Stichler testified, the uniform pattern in Indiana indicates that the public utility serving the community at wholesale expands into the retail market when the municipality decides to discontinue its electric utility. I & M, the only source of power to the plaintiff municipalities, has retail tariffs on file that encompass the plaintiffs' territories.

Since 1957, I & M has purchased or leased the facilities of five municipalities it formerly served at wholesale. As a result, the customers previously served by those municipal utilities became direct retail customers of I & M immediately thereafter, and they remain I & M's customers today. Defendants have had, and currently have, a policy of acquiring municipal utilities where possible and they presently are considering the purchase of the municipal utility of the Town of Avilla, a plaintiff in this case.

The evidence shows that plaintiffs and I & M compete for customers of the municipal utilities in the same manner as that found by the Supreme Court of the United States in *Otter Tail, supra.*

As the court there found:

> "In towns where Otter Tail distributes at retail, it operates under municipally granted franchises which are limited from 10 to 20 years. Each town in Otter Tail's service area generally can accommodate only one distribution system, making each town a natural monopoly market for the distribution and sale of electric power at retail. The aggregate of towns in Otter Tail's service area is the geographic market in which Otter Tail competes for the right to serve the towns at retail. That competition is generally for the right to serve the entire retail market within the composite limits of a town, and that competition is generally between Otter Tail and a prospective or existing municipal system. These towns number 510 and of those Otter Tail serves 91%, or 465." 410 U.S. at 369-370, 93 S.Ct. at 1025-1026.

This same kind of competition also was recognized and protected by the United States Court of Appeals for the District of Columbia in *Conway Corporation v. Federal Power Commission,* 167 U.S.App.D.C. 43, 510 F.2d 1264, 1268-1268 (1975), aff'd, 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed. 2d 626 (1976). See also Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy,* 72 Colum.L.Rec. 64 (1972) and Hearings on S. 218 Before the Senate Comm. on Commerce, 89th Cong., 1st Sess., ser. 89-38, at 68 (1965), both of which are quoted in *Conway, supra,* 510 F.2d at 1268, and at 1268, n. 11.

Actual and potential competition also exists between plaintiffs and I & M for certain customers presently located in some of the plaintiff municipalities. As the evidence shows, I & M serves nine large industrial customers at retail in the Cities of Mishawaka, Gas City and Niles, selling retail electric power to those customers at rates lower than its wholesale rates to the plaintiffs. Potential competition

for those customers exists, and the relationship between I & M's wholesale and retail rates is the major factor governing that competition. The evidence also indicates that I & M has competed for other industrial and residential customers presently served at retail by plaintiff Niles, Michigan.

Each of the plaintiffs is also in competition with I & M for customers in areas adjacent to their municipal boundaries. In some cases, both I & M and the municipalities offer electric services to those customers. Each of the Indiana plaintiffs also is in competition for those customers in that each is authorized to annex those areas, and thus to displace I & M as the electric utility that serves their customers at retail. The evidence shows that the Indiana plaintiffs have used their power of annexation to expand their boundaries, and consequently to expand their own retail market. These annexations by the plaintiffs result in their purchase of I & M's distribution lines and facilities in that area and their takeover of I & M's retail customers.[1]

1. At the time of oral argument the defendants cited and provided to this Court a full copy of the unpublished opinion in *SCM Corporation v. Xerox Corporation,* 463 F.Supp. 983 (D.Conn., No. 15,807, December 29, 1978, Newman, J.), a massive opinion in a massive case. Judge Newman has literally written a treatise in a wide ranging area of antitrust and patent law and the interrelationship between the two. The defendants appear to cite this case to demonstrate an analogy between the public grant of patent rights there and the public authorization of utility rates here. It is also cited for its relevant market discussion. The discussion of Section 2 of the Sherman Act commences at page 1006 of the opinion in unpublished form and concludes on page 1015. At page 1011 Judge Newman states:

> "With respect to assets other than patents, there is authority that a monopolist's unilateral refusal to deal violates the antitrust laws where the refusal is a part of an attempt to further monopoly power. *E. g., Lorain Journal Co. v. United States* [342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162], supra; *Otter Tail Power Co. v. United States* [410 U.S. 336, 93 S.Ct. 1022, 35 L.Ed.2d 359], supra."

The reasoning in SCM considered in its own factual setting, does not compel a result contrary to the one here announced.

Memorandum Opinion of the District Court, January 30, 1979

II.

The evidence in this case shows that, through I & M, the defendants have a monopoly of the retail sales of electric power within I & M's service area, and that they have a complete monopoly of plaintiffs' power supply. At issue in this case is the manner in which defendants have used the leverage afforded by this total monopoly over plaintiffs' power supply to preserve and expand their monopoly of retail sales in I & M's service area. The evidence shows that defendants have engaged in anticompetitive and exclusionary acts and practices having the purpose and effect of preserving and expanding I & M's existing monopoly in retail sales of electric power.

Beginning in 1972, defendants have forced the plaintiffs to purchase wholesale electric power pursuant to unregulated rates that are unjust and unreasonable and that, for substantial periods of time, have required the plaintiffs to pay more for their wholesale electric power than they would have paid if they had purchased the same electric power at retail. Under the Federal Power Act, defendants can put I & M's wholesale rates into effect simply by filing a tariff. Thereafter, those rates remain in effect at the level set by defendants until the Federal Commission has adjudicated their justness and reasonableness or until they are superseded by new rates. By filing higher superseding wholesale rates before the Commission has adjudicated I & M's former tariffs, defendants have, since 1972, served plaintiffs pursuant to unregulated rates that have never been approved at the levels filed and charged by I & M.

Not only have defendants patterned I & M's rate filings in a manner that effectively abrogates the protections that plaintiffs might expect from the Federal Commission, they themselves have ignored their own obligations under the Federal Power Act. The Act requires that public utilities charge only rates that are "just and reasonable" and

specifically declares that any nonconforming rates are unlawful. 16 U.S.C. § 824d(a). Not once during the entire period at issue have defendants charged a wholesale rate that the Commission has determined to be just and reasonable; on each occasion when a Commission Administrative Law Judge has examined I & M's wholesale rates, he has concluded that they were excessive, unjust and unreasonable, and has ordered them lowered.

The Federal Power Act also requires defendants to compare I & M's wholesale rates against its retail rates, consider their possible anticompetitive impact, and not require any of the plaintiffs to pay more at wholesale than it would under I & M's retail rates in effect without justifying the higher wholesale rates. Defendants have ignored this obligation as well. As the evidence clearly indicates, the defendants made no attempt to compare their wholesale and retail rates, much less to consider the possible anticompetitive impact of that relationship and try to avoid the anticompetitive consequences or, at a minimum, justify any anticompetitive consequences that the defendants claim cannot be avoided.

I & M's anticompetitive wholesale rates have been imposed on the plaintiffs in disregard of these statutory obligations. From July 27, 1976 to August 31, 1978, defendants required the plaintiff municipalities to pay over $4 million more at wholesale than they would have paid under I & M's retail rates then in effect. Defendants filed these excessive and discriminatory wholesale rates without giving proper consideration to their relationship to I & M's retail rates or to the anticompetitive impact of that rate relationship. At no time while these rates were in effect did the defendants make a proper effort to justify the substantial disparity between I & M's wholesale and retail rates, either to the Federal Energy Regulatory Commission or to this court.

Memorandum Opinion of the District Court, January 30, 1979

Defendants' anticompetitive rate practices have been compounded by a number of other exclusionary acts. All three of the defendants made serious and repeated statements that they desire to withdraw from the wholesale market and that, in the event of power shortages, the plaintiffs' power supply will be curtailed first while I & M continues to serve its retail customers. Similarly, defendants sought to impose a "day-to-day service limitation in its contract with the City of Mishawaka, to limit its contract to three years, and to impose discriminatory restrictions on the quantity of power that Mishawaka could purchase at current rates. Even after that contract was held to be unjust, unreasonable and discriminatory by an FERC Administrative Law Judge, I & M offered similar contracts to the other plaintiffs.

Each of the defendants' anticompetitive acts is exclusionary and impairs the plaintiffs' ability to continue to operate their municipal utilities and to continue to compete with I & M. I & M's unjust and unreasonable wholesale rates, and in particular I & M's imposition of wholesale rates that are in excess of its comparable retail rates, impair each plaintiff's ability to offer competitive rates and service to present and potential customers and to offer its citizens the full range of benefits they otherwise would obtain from the ownership and operation of their municipal utility. Defendants' deliberate statements threatening plaintiffs' power supply cast doubt on the plaintiffs' ability to offer adequate service to existing and potential customers. All of defendants' repeated anticompetitive practices together have left plaintiffs with no choice but to engage in constant time-consuming and costly litigation, thus diverting the resources that should be committed to the operation of their municipal utilities and to the provision of the benefits to those operations to attempting to secure just and equitable treatment in accordance with the antitrust laws and the Federal Power Act.

Memorandum Opinion of the District Court, January 30, 1979

The history of plaintiffs' experience before the Federal Commission demonstrates that the relief it can offer invariably comes too little and too late. Commission-ordered refunds take years to obtain, and even then are only obtained as the result of expensive and unreimbursed administrative litigation. As the Court of Appeals recognized, these refunds do not provide an antitrust damage remedy, *City of Mishawaka, Indiana v. Indiana & Michigan Electric Co.*, 560 F.2d 1314, 1325 (7th Cir. 1977), *cert. denied*, 436 U.S. 922, 98 S.Ct. 2274, 56 L.Ed.2d 765 (1978), and the belated refunds do nothing to remedy or mitigate the anticompetitive impact of I & M's excessive and discriminatory rates that plaintiffs suffer during the considerable periods of time that they are in effect. Finally, although the Power Act places the primary obligation on the defendants to charge only just and reasonable rates and to consider and avoid anticompetitive discriminations between I & M's wholesale and retail rates, the Power Act does not authorize the FERC to issue an injunction mandating future compliance. Each successive violation of the Act must be considered by the Commission individually in lengthy and costly administrative adjudication. Each Commission remedy comes long after the fact, and always after the defendants have superseded one illegal wholesale rate with another, higher illegal rate.

In August of 1977, the Court of Appeals for the Seventh Circuit made the following observation:

> "Thus far, the Commission has never rejected rate filing on price squeeze or other antitrust grounds, and there is no limit on the number of filed increases that may be in effect at the same time under Section 205. Simply by filing an anti-competitive increase and waiting for time to pass, a public utility like defendant can place a price squeeze on wholesale customers." 560 F.2d 1325.

Memorandum Opinion of the District Court, January 30, 1979

The comprehensive opinion of Judge Cummings, joined by Judges Tone and Bauer is not only persuasive authority but it represents a significant part of the law of this case.

Defendants' anticompetitive practices continue to impair plaintiffs' ability to serve their citizens and customers and to weaken their ability and resolve to continue operating their municipal utilities and compete with I & M.

As the Seventh Circuit recognized in *Sargent-Welch, supra,* 567 F.2d at 710-711, the monopolization provision of Section 2 does not require that the defendant have acted with specific intent to monopolize; general intent is sufficient. General intent is simply "an intent to bring about the forbidden act," *United States v. Aluminum Co. of America,* 148 F.2d 416, 432 (2d Cir. 1945); *i. e.,* the act that has the forbidden consequence. The specific intention to achieve that forbidden consequence need not be proved. "It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements." *United States v. Griffith,* 334 U.S. 100, 105, 68 S.Ct. 941, 944, 92 L.Ed. 1236 (1948). "A business organization which has acquired monopoly power is guilty of monopolization if it undertakes a course of action the consequence of which would be to exclude competitors or prevent competition." *American Football League v. National Football League,* 205 F.Supp. 60, 64 (D.Md.1962), *aff'd,* 323 F.2d 124 (4th Cir. 1963).

The Supreme Court recognized in *Griffith, supra,* that "[t]he anti-trust laws are as much violated by the prevention of competition as by its destruction," 334 U.S. 107, 68 S.Ct. at 945, citing *United States v. Aluminum Co. of America, supra.* Accordingly, "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *Id.* See also *Otter Tail Power Co. v. United States,* 410 U.S. 366, 377, 93 S.Ct. 1022, 1029 (1973). Sub-

sequently, in *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571, 86 S.Ct. 1698, 1704 (1966), the Court explained,

> "The offense of monopoly . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

As *Griffith* indicates, a monopolist's original acquisition of monopoly power by legitimate means is no defense to a charge that he has sought to maintain or extend that position by prohibited means. This is illustrated by *Otter Tail*, where the District Court noted that the plaintiff raised no challenge to the manner in which the defendant had obtained its monopoly. *United States v. Otter Tail Co., supra*, 331 F.Supp. at 58. Concluding that defendant possessed monopoly power, however, the District Court regarded the question then to be "whether Otter Tail has sought to *maintain* that power." *Id.* at 59. (Emphasis in original.)

One possessing monopoly power need not be found to have engaged in predatory conduct in order to have engaged in prohibited monopolization. Frequently the offense of monopolization is based on the conclusion that the defendant has engaged in "exclusionary conduct"—conduct that does not further competition on the merits or that tends to impair the opportunities on the merits or that tends to impair the opportunities of his rivals to compete. Thus, as the Seventh Circuit stated in *Sargent-Welch, supra*, 567 F. 2d at 711-712:

> "There are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tend-

> ency, are unlawful under § 2 if done by a monopolist, *e. g.*, the leasing practices *United States v. United States Machinery Corp.*, 110 F.Supp. 295, 343 (D.Mass. 1953), *aff'd per curiam*, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954); see also 1 von Kalinowski § 8.02[4][b], p. 8-55."

See also E. Kintner, *An Antitrust Primer, A Guide To Antitrust Law And Trade Regulation Laws For Businessmen*, p. 106 (2d Ed. 1973). Defendants have repeatedly contended that plaintiffs cannot prevail unless they establish that the challenged acts and practices are "predatory" in nature. Indeed, they even have suggested that the Seventh Circuit's opinion in *Sargent-Welch* supports that proposition. Although *Sargent-Welch* nowhere mentions "predatory acts," the defendants' "edited" quotation from that opinion is advanced in a manner that seems to suggest that such a finding is essential to recovery. The authorities discussed above demonstrate the error of defendants' position. Moreover, it is significant to note that the Seventh Circuit supported its conclusion that a monopolist cannot engage in conduct that might be permissible for a non-monopolist by citing the *United Shoe* opinion—a case that found a violation of Section 2 on the basis of conduct that it specifically found was not predatory. Certainly the Seventh Circuit's explicit reliance on *United Shoe* belies defendants' attempt to advance *Sargent-Welch* in support of their argument that predatory acts are an essential prerequisite to a finding of liability under Section 2 of the Sherman Act. A monopolist's exclusion of its competitors from a source resource or facility is particularly condemned by the antitrust laws. *United States v. Otter Tail, supra*, 331 F.Supp. at 61.

Perhaps the best-known judicial finding of illegal monopolization in the absence of evidence of predatory acts is the *Alcoa* case. *United States v. Aluminum Company of*

America, supra. There the defendant had not engaged in predatory, unfair or forbidden practices. Its monopoly position instead resulted from the practice of entering each new field as the opportunity presented itself, and thus expanding to meet and satisfy the market demand for aluminum. Judge Learned Hand found that this conscious expansion constituted monopolization:

> "It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel." *Id.* 148 F.2d 431.

The classic opinion in *United States v. United Shoe Machinery Corp.,* 110 F.Supp. 295 (D.Mass.1953), *aff'd per curiam* 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954), likewise found a violation of Section 2 on the basis of practices that the court specifically acknowledged were not "predatory, immoral, nor, on their fact, discriminatory as between different customers." *Id.* at 297. There the primary evil was the defendant's practice of leasing shoe manufacturing machinery rather than offering it for sale. This and other practices were acknowledged to be natural and normal practices that were, to quote Judge Learned Hand, "honestly industrial." *Id.*, at 344, quoting *Alcoa, supra,* 148 F.2d at 431. And although the non-monopolist could freely engage in those same practices, the monopolist could not. See also, *Greyhound Computer Corp. v. IBM,*

559 F.2d 488 (9th Cir. 1977), cert. den. 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978). For a current and careful analysis of this area see *U. S. v. CBS, Inc.*, 459 F.Supp. 832 (C.D.Cal.1978).

The antitrust laws are particularly hostile to the use of monopoly power in one market to restrict competition in another. For example, in *United States v. Griffith, supra,* the Supreme Court of the United States concluded that the defendant's use of the leverage it possessed from its monopoly of movie theatres in some towns to enhance its bidding position in non-monopoly towns constituted a violation of Section 2. Similarly, in the recent opinion of *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977), Judge Frankel regarded the judicial decisions proscribing tie-ins as per se violations of the antitrust laws to be "cognate authority" for the resolution of charges that defendant Kodak had used the leverage it enjoyed from its monopoly position in one market to gain competitive advantage in another. *Id.*, 457 F.Supp. at 413. Concluding that Kodak's use of its market position in the second market was not "economically inevitable," *id.* at 414, *citing United States v. United Shoe Machinery Corp.*, 110 F. Supp. at 345, and was "plainly avoidable," *id.*, the court in *Berkey* found these practices to be in violation of Section 2.

Relying on *Sargent-Welch Scientific Co., supra,* the *Berkey* court rejected defendants' protest that it was being punished for conduct that other firms, lacking monopoly power, regularly engaged in with impunity. As Judge Frankel observed, "[T]he short answer is that the antitrust laws do not permit the willful maintenance of monopoly power by conduct that might for a company without such power be deemed 'honestly industrial.'" *Berkey Photo, Inc., supra,* 457 F.Supp. at 414, quoting *United States v. Aluminum Co. of America, supra,* 148 F.2d at 431.

A monopolist's practices are subjected to much more rigorous scrutiny.

Obviously, one possessing monopoly power must take care to avoid abuse of that power by refraining from engaging in activities having a "tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency." *Sargent-Welch, supra,* 567 F.2d at 711-712. Under the applicable antitrust standards, this court must determine whether defendants' behavior represents simply the employment of processes and techniques "which a competitive society must foster," *United Shoe, supra,* 110 F.Supp. at 344, or whether a preponderance of the evidence indicates that defendants have proceeded by "arrangements, and policies which, instead of encouraging competition based on pure merit, further[ed] the dominance of a particular firm." *Id.,* at 344-345; see also *Berkey, supra,* 457 F.Supp. at 412.

The evidence in this case shows that defendants have used their control over plaintiffs' power supply to protect and further I & M's dominance of the electric power business in its area. The defendants' practices of requiring plaintiffs to pay unjust, unreasonable and discriminatory rates for electric power, attempting to withdraw from the wholesale market, attempting discriminatorily to limit I & M's obligation to serve its municipal customers to short terms and restricted quantities, all have impaired the plaintiffs' ability to compete. This is the same kind of use of monopoly power in one market to stifle competition in another that was condemned by the Supreme Court of the United States in *Griffith* and more recently by the District Court in *Berkey.* Defendants' conduct is in violation of Section 2 of the Sherman Act.

One central issue in judicial decisions frequently has been whether the challenged exclusionary conduct was "inevitable," or whether it might have been avoided had the

monopolist chosen to do so. *United States v. Aluminum Co. of America, supra,* 148 F.2d at 431; *Berkey, supra,* 457 F.Supp. at 414; *United Shoe, supra,* 110 F.Supp. at 345. This consideration also was emphasized by the Seventh Circuit in this very case, *City of Mishawaka v. Indiana & Michigan Electric Co., supra,* 560 F.2d at 1320, and in the opinion of *City of Shakopee v. Northern States Power Co.,* Civ.No.4-75-591 (D.Minn.1976) on which the Seventh Circuit relied. (although unpublished, this court has carefully examined the full order in *Shakopee.*)[2]

The antitrust laws require that a monopolist avoid exclusionary conduct that is not inevitable. In this case, that general antitrust obligation is complemented by a similar duty arising from Section 205(b) of the Federal Power Act, which prohibits undue discrimination between wholesale rates and state-regulated retail rates.

Section 205(b) of the Federal Power Act specifically prohibits public utilities from "subject[ing] any person to any undue prejudice or disadvantage" or "maintain[ing] any unreasonable difference in rates", *16 U.S.C. § 824d(b).* In *Conway Corporation v. Federal Power Commission,* 167 U.S.App.D.C. 43, 510 F.2d 1264 (1975), *aff'd,* 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed.2d 626 (1976), the Court of Appeals for the District of Columbia Circuit held that the Federal Power Commission had jurisdiction to consider the possible anticompetitive effects of the relationship between wholesale and retail rates, and that the Commission must consider such allegations that are presented to it. The Court's ruling was based on its determination that the prohibition

2. In the recent case of *City of Newark et al. v. Delmarva Power & Light Co.,* —— F.Supp. —— (No. 77254, D.Del. Jan. 8, 1979, Stapleton, J.), there appears to be nothing in it that compels a result different than that announced here. The posture of the record here is in a much later procedural stage. To the extent that Judge Stapleton puts a slightly different shade on *City of Mishawaka et al. v. Indiana & Michigan Electric Company,* 560 F.2d 1314 (7th Cir. 1977), this Court is bound by its holding as a part of the law in this case.

against discrimination in Section 205 of the Federal Power Act prohibits discrimination between wholesale and retail rates. *Id.* at 1270-1272. The Supreme Court's affirmance of that decision, *Federal Power Commission v. Conway Corp.*, 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed.2d 626 (1976), likewise was based on its determination that a public utility's obligation to avoid any "unreasonable difference in rates" encompassed a duty to avoid such discrimination between wholesale and retail rates. *Id.* at 277-279, 96 S.Ct. at 2004. The Supreme Court concluded that a public utility does not automatically satisfy this duty simply by charging rates that are "just and reasonable" under Section 205(a) of the Power Act, 16 U.S.C. § 824d(a), and that the Commission can alleviate the anticompetitive effects of the relationship between retail rates and a "just and reasonable" wholesale rate by ordering the utility to charge a lower wholesale rate that falls within the "zone of reasonableness" contemplated by the Act.

Section 205 of the Federal Power Act, as interpreted by the Supreme Court in *Conway,* clearly requires I & M to avoid unreasonable and anticompetitive disparities between its wholesale and retail rates. More recently, in *Missouri Power & Light Company,* FERC Docket No. ER 76-539 (October 27, 1978) [Ex. P-191], the Federal Energy Regulatory Commission held that the absence of "relative parity" between wholesale rates and the actual retail rates in effect and being charged, *id.* at 7, establishes a "price squeeze" under the Federal Power Act, irrespective of the "intent" of the public utility. *Id.* at 9. This, in turn, creates a "presumption that the rates are unduly discriminatory." *Id.* at 10, n. 18. As the Commission noted, the increase in the company's retail rates appeared to eliminate the "price squeeze" in that case prior to the time Missouri Power & Light's prospective rate became effective. *Missouri Power & Light Co.,* FERC Docket No. ER 76-539

(October 27, 1978), at 7. In order to be satisfied of that fact, however, the Commission required the company to file its current industrial rate schedule. *Id.* Thus, clearly the Commission's focus is on *actual* rates, not some illusory proposed retail rate that may never be charged. Together, *Conway* and the Commission's decision in *Missouri Power* establish that defendants must consider and avoid anticompetitive effects caused by the relationship between I & M's wholesale rates and its actual retail rates, then in effect. The evidence reveals that defendants have not here attempted to honor this obligation.

In deposition testimony introduced in evidence in this case, John Howard, Senior Vice President for Rates of the American Electric Power Service Corporation, testified that I & M seeks the highest rates it believes it can justify under the applicable standards, giving no consideration to the competitive impact of I & M's rates on its municipal wholesale customers. [Howard deposition 1/27/78 at 57] Other depositions of the present and former I & M officials having responsibility for the company's wholesale rate filings in the Federal Commission since the *Conway* decisions confirm that defendants, although aware of *Conway*, have not and do not compare the rate levels between I & M's wholesale and retail customers, and that I & M has made no changes whatsoever in its procedures following *Conway* for the purpose of complying with its obligations under the Federal Power Act. [Kopper deposition 10/3/78 at 54; Stark deposition 10/2/78 at 29-34; Tupper deposition at 53]

Defendants' disregard of their statutory obligation to avoid undue discrimination between wholesale and retail rates was further confirmed at trial. Robert M. Kopper, Executive Vice President and chief operating officer of I & M from 1968 to 1976 [Tr. 333], testified that no changes were made in I & M's standards and procedures for the

purpose of complying with the requirements of the Federal Power Act, as interpreted in *Conway*. [Tr. 359] Similarly, Jack F. Stark, Mr. Kopper's successor as Executive Vice President of I & M from 1976 to 1978 [Tr. 759], testified at trial that I & M has never had a policy of tailoring wholesale rates to prevent them from being higher than its retail rates, then in effect [Tr. 765] and that this has not even been a subject of discussion. [Tr. 766] Mr. William A. Black, who became Executive Vice President of I & M in July of 1978 [Black deposition, at 4] and currently serves in that position [Tr. 580], testified that he has not reviewed I & M's present or proposed rates, and that he has taken no action to assure that the rates I & M charges its wholesale customers are not higher than the rates those customers would pay if they were being served at retail. [Tr. 593-594] Nor has Mr. Black had any discussions about the possibility of tailoring I & M's rate applications to provide for competitive wholesale and retail power rates. [Tr. 596]

Thus, defendants continue to prepare and file their wholesale rate applications in disregard of their obligation under Section 205 of the Power Act to refrain from undue discrimination between wholesale and retail rates. This violation of their Power Act obligation constitutes a willful disregard of their legal obligations. Defendants' willful refusal to apply the regulatory criteria established by the Federal Power Act is a clear violation of the defendants' duties under that Act and under the antitrust laws as well.

In view of defendants' monopoly power, only a general intent to monopolize must be shown. Even if a "specific intent" were required, however, the evidence is adequate to meet that standard.

In virtually all cases requiring a finding of intent, that intent is inferred from the nature of the acts at issue. More direct proof of intent is the exception rather than the rule.

Memorandum Opinion of the District Court, January 30, 1979

The Supreme Court of the United States recently recognized this principle in *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), a criminal case brought under Section 1 of the Sherman Act. After carefully reviewing the law of criminal intent, the court stated, 438 U.S. at 444, 98 S.Ct. at 2877:

> "Our question . . . is whether a criminal violation of the antitrust laws requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the 'conscious object' of producing such effects or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow. While the difference between these formulations is a narrow one, see ALI Model Penal Code § 2.02, comment, at 125 (Tent. Draft 4 1955), we conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws."

See also *id.*; n. 21.

If intent can be inferred from conduct in criminal antitrust cases, it obviously can be inferred in civil actions, where the constitutional concerns are of a substantially diminished magnitude. Moreover, in reaching its determination, this court must assess the evidence in its entirety. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962); *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), cert. den. 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977).

All of defendants acts and practices, taken together, show that they have acted with "specific intent" to impair plaintiffs' competitive ability, and thus to preserve and

expand their existing monopoly. The "probable consequence", [*United States v. Gypsum, supra,* 438 U.S. at 444, 98 S.Ct. at 2877] of I & M's dual rate structure is that the imposition of wholesale rates in excess of I & M's comparable retail rates will impair plaintiffs' ability to offer rates and services competitive with I & M's, and thus diminish their ability and resolve to remain in the electric power business in competition with I & M. As *Gypsum* indicates, the evidence need not specifically show that this was defendants' "conscious object" in order to establish that they specifically intended that result.

The specific intent in defendants' statements threatening plaintiffs' power supply is clearer. As Administrative Law Judge Samuel Kanell found, defendants' conduct "inhibits growth within the service area of these wholesale customers and frustrates any effort to encourage new industry or commercial activity to locate within the service area of the complainants." [Ex. p-6, and D-106, Initial Decision, at 14] Judge Kanell concluded that the defendants had not shown that the needs of the electric users served by I & M's wholesale customers were substantially different from I & M's retail customers, *id.* at 15-16, and that defendants actions "created apprehension, uncertainty and potential prejudice with respect to future continuity of service." *Id.* at 16. Finally, as Judge Kanell found:

> "The service areas of the municipal utilities are located generally within the area served by AEP and it may be reasonable to conclude that if electric service by AEP to any of these municipal distribution systems were disrupted, AEP would develop arrangements to directly serve the patrons of these local systems in the same manner that AEP has been serving several large industrial firms located within the service areas of some of these municipal systems. If this were

> to occur, there would be no change in the total power demands on the AEP system." *Id.* at 17.

The Administrative Law Judge concluded that these activities were in violation of defendants' traditional utility obligation to serve all customers on a nondiscriminatory basis, *id.* at 16, and ordered AEP to treat all classes of customers fairly and equitably, and to cease and desist from any actions that single out any class of customers for the purpose of indicating that its continuity of service may be in jeopardy. *Id.* at 20.

The Supreme Court has recognized that the doctrine of *res judicata* applies to factual findings made by administrative agencies acting in their judicial capacity in cases in which the agency resolved disputed factual issues that the parties had an adequate opportunity to litigate. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966). *Res judicata* is particularly appropriate where, as here, the agency's findings reflect its particular expertise in an area committed to it by Congress. Judge Kanell's decision and all of the Initial Decisions in which plaintiffs have successfully challenged defendants' practices have been appealed, however, they are not final. 18 C.F.R. §§ 1.30-1.21. This may deprive Judge Kanell's decision of the formal *res judicata* effect to which it should be entitled. Nevertheless, the considered opinion of an Administrative Law Judge, acting within his area of particular expertise and on the basis of a fully litigated record, is entitled to considerable deference. At a minimum, the facts found by Judge Kanell are *prima facie* evidence of the truth of those matters. These facts are likewise established by independent evidence introduced in this case, and have not been rebutted by evidence offered by defendants.

Judge Kanell's legal conclusion that defendants have violated their traditional public utility obligation to serve

all customers within I & M's service area on a fair and equitable basis is clearly supported by the evidence in this case. This court should also conclude that defendants' attempt to withdraw from the wholesale market and their other discriminatory attempts to restrict I & M's duty to serve the plaintiffs violated I & M's common law public utility obligation to offer service to all customers within the service area on an equitable and nondiscriminatory basis.

In *United Gas Co. v. Railroad Comm'n of Ky.*, 278 U.S. 300, 309, 49 S.Ct. 150, 152, 73 L.Ed. 390 (1929), the Supreme Court of the United States stated:

> "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give."

Cf. *Pennsylvania Water & Power Co. v. Consolidated Gas, Electric Light & Power Co.*, 184 F.2d 552, 567 (4th Cir.), *cert. denied*, 340 U.S. 906, 71 S.Ct. 282, 95 L.Ed. 655 (1950).

This same public utility obligation is recognized in the laws of Indiana and Michigan, which require public utilities to provide reasonably adequate service to all at reasonable rates and without undue discrimination. For example, the Indiana statutes define "utilities" to include all plants furnishing "heat, light, water or power, *either directly or indirectly to the public,*" Ind.Code Ann. § 8-1-2-1 (emphasis added), and specifically require that each such public utility "furnish reasonably adequate service and facilities," *id.*, § 8-1-2-4. As the Indiana courts have recognized, that State's law imposes a duty to serve the public without discrimination, *Indiana Natural Gas & Oil Co. v. State ex rel.*

Armstrong, 162 Ind. 690, 71 N.E. 133 (1904); *Richmond Natural Gas Co. v. Clawson,* 155 Ind. 659, 58 N.E. 1049, (1900), and the Indiana statutes make undue discrimination by a public utility a misdemeanor. Ind.Code Ann. § 8-1-2-105. Michigan statutes also codify the common law obligations of public utilities, requiring that they offer utility services "to the public generally" on reasonable terms, rates and conditions as determined by the Michigan Public Service Commission. Mich.Stat.Ann. § 22.13(6) [M.C.L.A. 460.6]. The courts of Michigan have likewise held that public utilities operating in Michigan have a duty to serve all patrons without discrimination, *Michigan Public Service Co. v. Maddy,* 284 Mich. 392, 279 N.W. 874 (1938); *Ten Broek v. Miller,* 240 Mich. 667, 216 N.Y. 385 (1927).

The Federal Power Act, enacted to fill a constitutional gap in state regulation of electric utilities, *Federal Power Commission v. Southern California Edison Co.,* 376 U.S. 205, 213, 84 S.Ct. 644, 650, 11 L.Ed.2d 638 (1964), placed federal regulation on the same basis as regulation under the previous common law and state statutes. The Act incorporated the common law and state statutory prohibition against discrimination between consumers in Section 205, 16 U.S.C. § 824d(b), which was interpreted by the Supreme Court in *Federal Power Commission v. Conway Corp., supra,* to proscribe discrimination between wholesale and retail rates. Defendants cannot argue that the imposition of federal jurisdiction over I & M's wholesale sales relieved I & M of its common law and statutory obligations to avoid discrimination among I & M's customers. Moreover, federal antitrust law recognizes complementary obligations on persons possessing scarce resources or facilities that are essential to effective competition. As the District Court observed in *United States v. Otter Tail Power Co.,* 331 F.Supp. 54, 61 (D.Minn.1972), aff'd 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973):

Memorandum Opinion of the District Court, January 30, 1979

"Pertinent to an examination of the law is a reference to cases expressive of the 'bottleneck theory' of antitrust law. This theory reflects in essence that it is an illegal restraint of trade for a party to foreclose others from the use of a scarce facility. Here the theory finds application in Otter Tail's use of its subtransmission lines. One authority believes:

> 'The Sherman Act requires that where facilities cannot practically be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms."[3]

"This statement epitomizes the holdings in federal cases which have established the principle: *United States v. Terminal Railroad Assoc.*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.*, 194 F.2d 484 (1st Cir. 1952); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3rd Cir. 1958); *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966)." *United States v. Otter Tail Power Co.*, 331 F.Supp. 54, 61 (D.Minn.1972) *aff'd*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

Taken together, defendants' actions show that they were undertaken with the specific intent of impairing the plaintiffs' competitive position and preserving and expanding I & M's monopoly in retail sales of electric power in its service area.

The defendants' practices of requiring the plaintiffs to pay unjust, unreasonable, and discriminatory rates for electric power, their attempt to withdraw from the wholesale market and discriminatorily to limit I & M's obligation to

3. A. D. Neale, *The Antitrust Laws of the U. S. A.*, Cambridge University Press at 67 (1960).

serve its municipal customers to short terms and restricted quantities, which Administrative Law Judges in the Federal Commission repeatedly have found in violation of the Federal Power Act and defendants' public utility obligations, were not "honest industrial" practices or "economically inevitable" events. All were deliberate acts aimed at the plaintiffs, unprovoked, unjustified, and clearly avoidable. Specific intent is present in this case.

III.

Defendants contend that because I & M's wholesale and retail rates result from filings before the state and federal commissions the First Amendment immunizes their rate practices from antitrust scrutiny. For support, they rely on *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed. 464 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed. 626 (1965).

The same argument was considered and rejected by the Supreme Court of the United States in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976). *Cantor* involved an antitrust challenge to an electric utility's practice of providing light bulbs to its customers without separate charge pursuant to a "lamp exchange program" that was incorporated in its rates on file with the Michigan Public Service Commission. The utility's rates, including its omission of any separate charge for the bulbs, had been approved by the Commission. Thus, as the court recognized, the defendant utility was required to continue the program until it filed and obtained Commission approval for a new tariff that did not contain that program. *Id.* at 582-583 and at 585, 96 S.Ct. at 3114 and 3115.

Not only did the court reject the contention that the Commission's approval gave rise to a *Parker v. Brown* de-

fense, it also specifically held that the *Noerr-Pennington* was inapplicable. As the court stated, 428 U.S. at 601-602, 96 S.Ct. at 3123:

> "[N]othing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct."

The *Cantor* decision is precisely on point. Defendants' purported *Noerr-Pennington* defense is not well taken.

A comparison of I & M's wholesale rates with its actual retail rates in effect during the period July 1976 to August 1978 shows that defendants required plaintiffs to pay over $4 million more pursuant to their wholesale rates than plaintiffs would have paid under I & M's actual retail rates, then in effect and charged by I & M to its non-competing retail customers.

None of I & M's proposals during the period for increased retail revenues was approved by the Public Service Commissions of Indiana or Michigan at the levels sought by the defendants. Defendants are aware that their filings for increased retail rates rest on questionable assumptions and judgments, the rejection of which will reduce I & M's retail rates. Though defendants here assert that their proposed retail rates are the only appropriate measure of their intent, the evidence shows that they do not regard these proposed retail rates to be sufficiently reliable to warrant their inclusion in their own operating forecasts. Instead, they regard their own proposed retail rates as "intangible" and "uncertain." I & M's wholesale rates are included in the company's financial projections; its proposed retail rates are not. [Disbrow deposition at 154-156]

In addition, I & M had no proposed retail rates on file with the Public Service Commissions of Indiana and Michigan during long periods of the time at issue in this case. Defendants argue that their intent is to be assessed by reference to proposed rates for these periods as well, conveniently adopting proposed retail rates that had by then been rejected as excessive by the State Public Service Commissions or rates that had not been proposed for some of the months for which they are advanced.

Measuring the disparities of defendants' dual rate structure by reference to I & M's proposed retail rates establishes a misleading standard that bears no resemblance to the real world in which plaintiffs and I & M compete. Defendants' attempt to avoid liability for their anticompetitive practices by resort to this fiction should be rejected.

Defendants offered no evidence in support of their asserted cost justification for I & M's discriminatory dual rate structure other than I & M's initial rate filings submitted to the various commissions. Because the defendants in preparing and filing new rates have refused to consider the relationship between I & M's wholesale and retail rates, I & M's initial filings before the commissions do not even attempt to establish a cost justification for the disparity between those rates.

Further, the evidence shows that none of I & M's wholesale rate filings to date have persuaded the Federal Commission that I & M's wholesale rates are just and reasonable as filed, and the Federal Commission has never approved as just and reasonable a wholesale rate under which I & M has charged any of the plaintiffs more than that municipality would pay under I & M's retail rates then in effect.

Defendants' contention that I & M's "bad faith" is not proved by an administrative finding that the company has filed and collected excessive, unjust, and unreasonable rate

is irrelevant. "Bad faith" is not required to be proved to establish a violation of the Sherman Act.

Defendant I & M's retail sales to consumers are regulated by the Public Service Commissions of Indiana and Michigan. In each state the company maintains three separate tariffs for large customers, corresponding to three levels of demand, or six retail tariffs in all. (In Indiana the tariffs are designated "IP," "QP" and "CP." In Michigan the tariffs are "LP," "QP" and "CP." In contrast, the company files before the Federal Commission one single wholesale tariff for service to all its wholesale municipal customers, including the plaintiffs. Wholesale Tariff "WS" consists of a single rate curve extending to all levels of demand and covering the range of all six of I & M's retail tariffs.

Defendants contend that the Seventh Circuit's decision in *Public Service Company of Indiana v. Federal Power Commission,* 575 F.2d 1204 (1978), prohibits the company from comparing its wholesale charges to the plaintiffs against the amounts they would have paid under I & M's retail rates, if that analysis requires it to compare different retail rates for different municipalities and results in its charging them different rates.

The evidence shows that since 1972 I & M has charged municipalities having different demands different rates, depending on their location on the rate curve under wholesale Tariff WS. [Tr. 162-165] Further the *Public Service* decision does not prohibit disparities between the rates I & M charges different municipalities in the class of wholesale customers. Rather, that case holds that any substantial disparities must be justified. *Id.*, 1212, see also *id.*, at 1212 n. 12. The promotion of competition, which is a common concern of both the federal antitrust laws and the "broadly procompetitive purposes" of Section 2 of the Federal Power Act, *Conway Corporation v. Federal Power*

Commission, supra, 167 U.S.App.D.C. at 50, 510 F.2d at 1271, is more than adequate justification for comparing defendants' wholesale charges to each plaintiff against the amount that plaintiff would have paid on I & M's retail tariff for customers having the same demand, in order to remove disparities between I & M's wholesale and retail rates.

IV.

All three defendants have participated in the violations shown by the evidence in this case. Relief against all three defendants is necessary to remedy their monopolization to date and to protect the plaintiffs against future violations.

Through defendant I & M the defendants control the electric power supply to all the plaintiff municipalities. Defendants have misused the leverage afforded by this monopoly to engage in a number of anticompetitive acts and practices.

I & M filed and collected unjust and unreasonable wholesale rates that, for considerable periods of time, required each plaintiff to pay more than it would have paid under I & M's retail rates then in effect. Service Corporation participated in setting and filing those wholesale rates, and has appeared before the Commission in support of them. Defendant AEP, which owns all the voting stock of both I & M and the Service Corporation and controls these corporations through interlocking offices and directorships as part of the integrated AEP System, benefited by the overcharges through its annual receipt of dividends from I & M.

All three defendants should be liable to each plaintiff for damages based on the amount of their overcharges to date. Injunctive relief against all of them to protect the plaintiffs against avoidable and unjustified overcharges in the future is necessary and appropriate in view of their integrated operations and control.

Each of these defendants participated directly in the AEP System's attempt to withdraw from the wholesale market. Each defendant issued statements to wholesale customers of the AEP System, including the plaintiffs, expressing their desire to withdraw from the wholesale market and urging their municipal customers to seek other sources of supply. Officials of the Service Corporation announced the System companies' intent to withdraw in a letter to wholesale customers, forwarded to each of the plaintiffs by I & M. Service Corporation officials also testified before the FPC in support of that policy. Defendant AEP issued a formal statement of its intent to withdraw from the wholesale market in its 1975 Annual Report.

I & M attempted, and continues to attempt, to restrict its obligation to its wholesale municipal customers to discriminatorily short time periods and limited quantities of power. Employees of both defendants I & M and Service Corporation testified before the FERC in defense of those practices. Finally, the evidence shows that all three defendants participated in the AEP System's policy of taking over municipal utilities whenever it can, and in implementing that policy in Indiana and Michigan.

The practices of all three defendants have compelled the plaintiffs to undergo time-consuming litigation and to incur litigation expenses here. Relief against all three defendants is needed to remedy the violations shown by the evidence and to prevent their monopolization in the future.

The evidence shows that the defendants through I & M have overcharged the plaintiffs both by requiring them to pay more at wholesale than they would have paid under I & M's retail rates then in effect and by requiring them to pay excessive, unjust, and unreasonable rates. Damages should be awarded each plaintiff in treble the amount of the overcharges it has paid. 15 U.S.C. § 15.

Memorandum Opinion of the District Court, January 30, 1979

Proof of a monopolistic overcharge establishes both that the direct purchaser has been "injured in his business or property" within the meaning of Section 4 of the Clayton Act and the amount of the resulting damages. *Hanover Shoe, Inc. v. United Shoe Machine Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). As the court there held:

> "[W]hen a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4." *Id.* at 489, 88 S.Ct. at 2229.

See also *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 262, n. 14, 92 S.Ct. 885, 891, n. 14, 31 L.Ed.2d 184 (1972); *Chattanooga F&P Works* v. *Atlanta*, 203 U.S. 390, 396, 27 S.Ct. 65, 66, 51 L.Ed. 241 (1906).

The circumstances in which a *prima facie* showing may be rebutted are extremely limited. For example, in *Hanover Shoe* the defendant argued that the plaintiff's pass-on of the overcharge to its own retail customers should be considered in defense where the "economic circumstances were such that the overcharged buyer could only charge his customers a higher price *because* the price to him was higher." *Hanover Shoe, supra*, 392 U.S. at 492, 88 S.Ct. at 2231. (Emphasis in original) The court rejected that contention, however, reasoning that such a defense would confront the antitrust plaintiff with almost insuperable difficulties of proof. *Id.* at 492-493, 88 S.Ct. at 2231.

The court further noted that the relatively small monetary interest of consumers made it unlikely that they would seek to enforce the antitrust laws, and thus that the recognition of a pass-on defense would allow "those who violate the antitrust laws by . . . monopolizing [to] retain the fruits

of their illegality because no one was available who would bring suit against them." *Id.* at 494, 88 S.Ct. at 2232. At the time *Hanover Shoe* was decided, the question of whether ultimate consumers could recover for such excessive overcharges passed through to them had not been resolved. Subsequently, however, the court held in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), that indirect consumers forced to pay higher prices as a result of a price fixing conspiracy could not sue on a pass-on theory. Thus, the concern expressed in *Hanover Shoe* has become an inevitable reality. Ultimate consumers cannot recover for overcharges passed on to them as a result of monopolistic overcharges imposed on their suppliers. Recognition of a passing-on defense to preclude the award of antitrust damages to the business entity directly subjected to a monopolistic overcharge thus would provide complete immunity for the monopolist.

Although *Hanover Shoe* recognized that there "might be situations—for instance, when an overcharged buyer has a preexisting 'cost-plus' contract", *Hanover Shoe, supra,* 392 U.S. at 494, 88 S.Ct. at 2232, where the passing-on defense might be available, the scope of that potential defense was severely limited in the *Illinois Brick* decision. After reiterating the *Hanover Shoe* concern that the pass-on defense would "add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness," *Illinois Brick, supra,* 431 U.S. at 737, 97 S.Ct. at 2070, the court left open only a narrow use of the pass-on defense. While acknowledging *Hanover Shoe*'s possible exception for a preexisting cost-plus contract, the *Illinois Brick* court explained that the pass-on defense might be available in that situation only because the purchaser "is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price." *Id.* at 736, 97 S.Ct. at

2070. This possible exception is thus clearly of no use to the defendant here. Not only are plaintiff's sales to its customers not governed by a cost-plus contract or its analogue, there is no fixed agreement as to the amount of purchase which would insulate plaintiff from the "interaction of supply and demand that complicates the determination" of passed-on cost. *Id.* at 737, 97 S.Ct. at 2070.

Defendants have suggested that the overcharge theory of damages is not available to an antitrust plaintiff whose overcharge is established, in part, by reference to the defendant's charges to its other customers. Counsel for defendants argued in his opening statement that plaintiffs' case really was one of price discrimination. [Tr. 44] Relying on *Interstate Commerce Commission v. United States*, 289 U.S. 385, 53 S.Ct. 607, 77 L.Ed. 1273 (1933), defendants contend that recovery cannot be allowed in the absence of other evidence of loss. [Tr. 45]

Defendants' position is in error. The *Interstate Commerce* case was not an antitrust case at all. Instead, it was a mandamus proceeding in which the petitioner sought to overturn the Interstate Commerce Commission's decision not to award damages under the Interstate Commerce Act. Although the court's discussion of the damage theory in the *Interstate Commerce* case cited its earlier antitrust decision in *Keogh v. Chicago & N. W. R. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922), the *Keogh* decision was limited by the court in *Hanover Shoe, supra*, 392 U.S. at 490 n. 8, 88 S.Ct. at 2230, n. 8, and the court's subsequent further limitation of the "passing-on" defense in *Illinois Brick, supra*, undercut whatever continuing vitality *Keogh* may have had. The other decisions relied on by defendants predate the Supreme Court's decision in *Hanover Shoe* and reflect an earlier adherence to the old passing-on defense that has since been firmly rejected.

Memorandum Opinion of the District Court, January 30, 1979

Though a passing-on defense might be available against corporate plaintiffs in a few rare circumstances where the plaintiff corporation and its owners and shareholders can pass on overcharges to their customers—a distinct group—such a defense is not available against the plaintiffs in this case. Each municipal utility's customers and owners are the same. The customers, the citizens of the municipality, have the power to discontinue the electric utility if it fails to produce sufficient benefits. The utility cannot relieve itself of the anticompetitive effects of defendants' overcharges by passing on the overcharges to its customers. Any overcharge "passed on" reduces the benefits provided by the utility and increases the likelihood that the customers will decide to discontinue the utility and sell it to the defendants.

The evidence in this case establishes two kinds of monopolistic overcharge. First, during the period 1972 to 1976, I & M charged the plaintiffs rates that were in excess of the just and reasonable rates required by Section 205 of the Federal Power Act. Defendants imposed that rate on plaintiffs unilaterally and without regulatory review and superseded it by a new, higher rate prior to the Commission's adjudication of its justness and reasonableness.

The rate charged by I & M for this period was held to be unjust and unreasonable by Administrative Law Judge Lewnes in FPC Docket No. E-7740. The parties later entered into a settlement based on that decision, and the settlement proposal was accepted by the Commission. As the Seventh Circuit has recognized, refunds ordered by the Commission are not an antitrust damage remedy. *City of Mishawaka, supra,* 560 F.2d at 1325.

The evidence also shows that plaintiffs have been overcharged by the amount that their wholesale rates exceeded the rates they would have been charged on I & M's retail rates, then in effect, and that defendants have not justified this overcharge. Plaintiffs, therefore, are entitled to re-

cover treble the amount of this overcharge as well. During the period August 1976 through August 1978, the overcharges totaled $4,049,461.97, or 12.86% of I & M's total billings to the plaintiffs. This court's order awards plaintiffs judgment against the defendants in treble that amount.

Section 16 of the Clayton Act provides:

> That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . .

Injunctive relief may be granted in addition to damages, or alone.

The evidence in this case shows that defendants' violations of the antitrust laws threaten the plaintiff municipalities with losses and damage, making injunctive relief necessary and appropriate. Defendants have been found in violation of the Federal Power Act for many of the same acts constituting their violation of the antitrust laws, specifically for attempting to withdraw from the wholesale market [FERC Docket No. E-9548] and for attempting to limit I & M's obligation to serve its municipal customers to short time periods and to discriminatorily restricted quantities of power. [FERC Docket No. ER76-792]. In every instance, defendants have appealed those findings and orders to the FERC, thereby relieving themselves of the present obligation to comply with the judges' remedial orders. The defendants' appeals have required the plaintiffs to continue to litigate in defense of those decisions and have prolonged the plaintiffs' uncertainty about the continuity and adequacy of their supply of electric power.

Memorandum Opinion of the District Court, January 30, 1979

Defendants, who control the supply of power to plaintiffs' municipalities, also have filed and charged the plaintiffs unjust and unreasonable wholesale rates and have required all plaintiffs during the past two years to pay over $4,000,000 more at wholesale than they would have paid under I & M's retail rates. Defendants have not attempted to avoid the overcharges as required by Section 205 of the Federal Power Act under the Supreme Court's decision in *Conway.*

The Court of Appeals for the Seventh Circuit already has indicated *in this case* that plaintiffs' establishment of an antitrust violation may entitle them to broad injunctive relief. As that court stated, on proof of plaintiffs' case, "The district court presumably would order defendant to file a new wholesale rate application that would remove the disparity between the rates charged plaintiffs and defendants' industrial customers." *City of Mishawaka, supra,* 560 F.2d at 1323. The court further noted:

> "The antitrust and regulatory regimes accommodate and supplement each other in order to provide full protection from anticompetitive practices. Here . . . the remedies afforded under the two statutes can be meshed." *Id.*

The Seventh Circuit held that injunctive relief may be appropriate even if the challenged wholesale rates were found to be just and reasonable by the Federal Commission. *Id.* at 1324. That, however, is not the case; none of I & M's wholesale rates here at issue have ever been found to be just or reasonable. To the contrary, every decision by the Administrative Law Judges of the Federal Commission with respect to the rates and practices here at issue has found them to be excessive, unjust, unreasonable, and unduly discriminatory.

Memorandum Opinion of the District Court, January 30, 1979

The defendants' continued overcharges, shown by the evidence, themselves threaten all of the plaintiffs with losses and damage making injunctive relief necessary. Despite the probability that plaintiffs will receive refunds from the FERC eventually, it is clear that the defendants' depriving the plaintiffs of the amount of the overcharges during the long periods of time required to obtain those refunds, causes the plaintiff municipalities and their citizens to lose benefits they otherwise would obtain from the use of those funds during that time.

The evidence also shows that defendants are sufficiently likely to continue their anticompetitive acts and practices to warrant injunctive relief. As plaintiffs have established, the Federal Power Act's prohibition against the defendants' maintaining any unreasonable difference in rates includes the obligation to avoid such differences between wholesale and retail rates. Though this was clearly indicated by the *Conway* decisions, the evidence clearly shows that the defendants have ignored *Conway* in preparing and filing the wholesale rates imposed on the plaintiffs.

The Federal Energy Regulatory Commission's recent decision in *Missouri Power & Light Co., supra,* holds that the absence of "relative parity" between actual wholesale and retail rates creates a presumption that the wholesale rate is unduly discriminatory. *Missouri Power* represents the Commission's first considered statement of the manner in which the Federal Power Act is to be interpreted in light of *Conway,* and overrules several prior decisions of FERC Administrative Law Judges that appeared to be more tolerant of "price squeezes."

The Seventh Circuit's decision *in this case* underscored defendant I & M's obligation to avoid anticompetitive practices where possible. *City of Mishawaka, supra,* 560 F.2d at 1320. In spite of this, and of the obvious complementary relationship between defendants' *Conway* obligation to

avoid undue discrimination between their wholesale and retail rates and their antitrust obligation to avoid exclusionary practices, defendants did not even consider the relationship between their wholesale and retail rates when they prepared and filed their wholesale rates in 1976 and 1978. Their willful disregard of their legal obligations could not be clearer.

Defendants' past rate practices, their present attitude toward their Federal Power Act obligation as interpreted by the *Conway* and *Missouri Power* decisions, their disregard of the Seventh Circuit's emphasis in this case on I & M's duty to avoid anticompetitive acts and practices, and the Commission's inability to require prospective adherence to the Power Act point to one conclusion: unless enjoined by this court, defendants will continue to ignore their obligations under the Federal Power Act and the antitrust laws and will continue to file and charge unjust and unreasonable wholesale rates in excess of comparable retail rates and to charge those rates until they are superseded by even higher rates. These practices will continue to injure plaintiffs in their business and property, and will insure that the plaintiffs' own rates to their customers are raised by the monopolistic overcharges imposed on them.

Here the Sherman Act and the Federal Power Act can easily be "meshed." *City of Mishawaka, supra,* 560 F.2d at 1323. As the Court of Appeals for the District of Columbia acknowledged, Title II of the Federal Power Act, which contains the Section 205 prohibition against discrimination between wholesale and retail rates, was enacted to serve "broadly procompetitive purposes." *Conway Corp., supra,* 510 F.2d at 1271. The federal antitrust laws serve that same purpose. Each compels defendants at least to consider the relationship and competitive impact of wholesale and retail rates and to refrain from their discriminatory

anticompetitive practices where possible. The court should order them to do so.

As the *Cantor* decision indicates, there is no *Noerr-Pennington* defense in this case. The basic purpose of the *Noerr-Pennington* doctrine is to assure access to the political system, the judicial system, and state and federal agencies. *California Motor Transport Co. v. Trucking Unlimited*, 405 U.S. 508, at 511, 92 S.Ct. 609, at 612, 30 L.Ed.2d 642 (1972). Here, the court can grant an injunctive remedy that will afford plaintiffs protection against the anticompetitive impact of defendants' practice of charging wholesale rates in excess of comparable retail rates for substantial periods of time and, at the same time, will allow I & M to properly seek rate increases whenever it chooses.

This court's order requires the defendants, in preparing and filing new wholesale rates for electric service to any of the plaintiff municipalities, (1) to project the "filing" determinants for each plaintiff for the first year the new wholesale rate will be in effect, and (2) to compare the projected wholesale billings to each plaintiff against the amount that plaintiff would pay under I & M's retail rates in effect at the time the wholesale rate is filed. I & M is enjoined not to put into effect or charge any of the plaintiffs a wholesale rate under which the projected wholesale billings to any plaintiff would exceed the amount that plaintiff would pay under I & M's retail rates, unless and until the Federal Energy Regulatory Commission determines that the wholesale rate is just and reasonable.

Nothing in this decree would prohibit I & M from filing a new wholesale rate higher than its retail rates, if the company puts the wholesale rate into effect prospectively by requesting that the effective date be deferred [18 CFR Section 35.3(a)] until the Commission has adjudicated the justness and reasonableness of that rate and if the company charges the plaintiffs only the just and reasonable rate,

whatever that eventually may be. Nothing in the decree prevents the defendants from designing I & M's rates so as to eliminate any disparity between I & M's rates so as to eliminate any disparity between I & M's wholesale and retail rates. Nothing prevents the defendants from timing the filing of I & M's wholesale rates so as to avoid charging any of the plaintiff municipalities more at wholesale than it would have paid under I & M's retail rates in effect. All of the foregoing procedures for eliminating the disparity between I & M's higher wholesale and lower retail rates are available to the company under the decree and the Federal Power Act. The question here simply is whether the court can and should compel the defendants, proved violators of the antitrust laws, to resort to those alternatives when rate increases are needed. The Seventh Circuit's presumption that even more sweeping remedies would be awarded demonstrates that this court can grant such relief. The facts established at trial clearly indicate that it should.

This relief would protect the plaintiffs against the anticompetitive impact of defendants' excesssive wholesale rates during the long period of time usually required for FERC finally to adjudicate these rates and set them at the just and reasonable level. In effect the relief in the court's order would shift the burden of excessive and exclusionary rates from the plaintiffs onto the defendants, where it belongs.

Sections 4 and 16 of the Clayton Act provide that prevailing plaintiffs should be awarded their costs of suit, including a reasonable attorney fee. 15 U.S.C. § 15; 15 U.S.C. § 26 as amended by P.L. 94-435, September 30, 1976. Section 4 of the Clayton Act provides that a plaintiff proving injury to his business or property "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. The Hurt-Scott-Rodino Antitrust Improvements Act of 1976,

Memorandum Opinion of the District Court, January 30, 1979

P.L. 94-435, September 30, 1976, amended Section 16 to provide as follows:

> "In any action under this section in which the plaintiff substantially prevails, the court shall award the costs of suit, including a reasonable attorney's fee, to such plaintiff."

The provision for the award of attorneys fees in Section 4 predated the institution of any of the litigation that was consolidated into this case. However, the comparable provision in Section 16 was not added until after the institution of Civil Actions S 74-72 and S 75-210.

In *Bradley v. Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), the Supreme Court of the United States reiterated the established principle that the federal courts should apply the law in effect at the time they render their decisions, unless that would result in manifest injustices or unless the applicable legislation or its history contains a direction to the contrary. *Id.*, at 711, 94 S.Ct. at 2016. The *Bradley* court therefore held that the provision of the Education Act Amendments of 1972, enacted after that case was submitted on appeal but before it was decided, was applicable, and that the plaintiff in *Bradley* was entitled to recover attorneys' fees under that statute.

The legislative history of the 1976 amendment to Section 16 of the Clayton Act indicates that Congress expressly contemplated that the amendment was intended to apply to cases instituted prior to its enactment. During the Senate debates, Senator Abourezk asked Senator Hart, for whom the legislation was named, whether the attorneys' fee amendment was to apply to cases instituted prior to the amendment. The following exchange resulted:

> "Does this mean that following the usual rule, as in such cases as *Bradley v. School Board of the City of*

> *Richmond,* 416 U.S. 696 [94 S.Ct. 2006, 40 L.Ed.2d 476] (1974), actions brought prior to the date of enactment, will still be eligible for such attorneys' fees awards?
>
> "Mr. Philip A. Hart. The answer is 'yes,' under that case and a number of other comparable cases. Cong. Rec.S.8960 (daily ed. June 10, 1976) (94th Cong. 2d Sess.)"

This quotation is set forth in full in *Alphin v. Henson,* 552 F.2d 1033, 1035 n. 3 (4th Cir. 1977), *cert. den.* 434 U.S. 823, 98 S.Ct. 67, 54 L.Ed.2d 80, the Fourth Circuit awarded attorney's fee to a plaintiff who had won injunctive relief but failed to prove damages in antitrust litigation instituted and decided by the District Court prior to the enactment of that amendment. Although the *Alphin* case had proceeded through the District Court, the mandate of the Court of Appeals had not issued prior to the amendment of Section 16 of the Clayton Act. Since the case was still in appellate litigation, the Court of Appeals ordered the award of fees based on that amendment.

The *Alphin* court's conclusion that the award of attorney fees would not result in manifest injustice is equally applicable here. As in *Alphin,* here the plaintiffs' persistent efforts will "have successfully vindicated the public interest and public policy expressed in the antitrust laws by bringing . . . monopolists to heel." *Id.* at 1034-1035. Fees and costs for the appellate litigation *in this case* also are appropriate, since the affirmance of this court's jurisdictional ruling was essential to plaintiffs' ultimate success on the merits. See, *e. g., Perkins v. Standard Oil Co.,* 399 U.S. 222, 90 S.Ct. 1989, 26 L.Ed.2d 434 (1970); *Alphin v. Henson, supra,* 552 F.2d at 1036.

The grant of relief either on plaintiffs' damage claim or on their claim for injunctive relief entitles the plaintiffs to an award of costs and fees. The plaintiffs will "substantially prevail" if the court grants the injunctive relief

sought, or similar injunctive relief, since the end result will be finally to compel the defendants to recognize and honor their obligations under the antitrust laws and under the Federal Power Act.

Consistent with its ruling during the trial of this case the award of costs and attorney fees are limited *to this case,* including the interim appeal taken by the defendants but exclude costs and fees incurred by the plaintiffs in the proceedings before the Federal Energy Regulatory Commission.

V.

Defendant I & M's counterclaims are baseless. Its First, Second, Third, and Fifth Counterclaims, attacking the plaintiffs' filing and maintaining this action, are barred both by the effect of the court's ruling denying defendants' motion to dismiss at the close of plaintiffs' case, and by the company's failure to offer any evidence in support of the counterclaims thereafter. In addition, by I & M's own admission, its first four counterclaims are premised on competition between plaintiffs and I & M that defendants claim does not exist.

This court's ruling rejecting defendants' motion to dismiss at the close of plaintiffs' case [Tr. 878] has put to rest defendant I & M's claim that plaintiffs are engaged in sham litigation. The result announced here confirms that conclusion.

Defendant I & M's First, Second, Third and Fifth Counterclaims are directed at plaintiffs' institution and maintenance of this litigation. The first three counterclaims contend that plaintiffs themselves have violated the antitrust laws by instituting antitrust litigation. The Fifth Counterclaim is premised on a contract theory, apparently asserting that plaintiffs' 1968 election to be served on tariff

MRS included an agreement by the plaintiffs perpetually to forego antitrust litigation.

The *Noerr-Pennington* doctrine precludes the imposition of antitrust liability on parties who resort to the courts in good faith to press what they believe to be legitimate grievances. As the Supreme Court of the United States stated in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511, 92 S.Ct. 609, 612, 30 L.Ed.2d 642 (1972):

> "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of views respecting resolution of their business and economic interests vis-a-vis their competitors."

Accordingly, antitrust liability for the institution and maintenance of litigation can only be imposed in cases in which the evidence reveals that the challenged lawsuit is a "mere sham to cover with is nothing more than an attempt to interfere directly with the business relationships of a competitor," *id.*, at 511, 92 S.Ct. at 612, *quoting Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, 81 S.Ct. 523, 533, 5 L.Ed.2d 864 (1961). The court's ruling that plaintiffs have proved a *prima facie* case bars I & M's First, Second and Third Counterclaims as a matter of law. The testimony of S. A. Brett disposed of I & M's contention that this litigation was instituted without probable cause and regardless of the merits. [Tr. 163-165] The court's subsequent ruling rejecting defendants' motion to dismiss confirmed the legitimacy of this case. As the court there stated, this case would have been submitted to the jury had it been a jury trial. [Tr. 878]

I & M's counterclaims have not been proved. Plaintiffs are entitled to judgment denying them for failure of proof.

Memorandum Opinion of the District Court, January 30, 1979

Defendant I & M's First and Second Counterclaims are based on its assertion that plaintiffs filed this case for the purpose of causing I & M to discriminate in price between plaintiffs and I & M's other municipal wholesale customers who are not parties to this litigation. I & M's Third Counterclaim asserts that plaintiffs filed this case for the purpose of forcing I & M to discriminate in price between plaintiffs and I & M's retail customers. I & M has introduced no evidence in support of these claims, and there is none.

The Federal Energy Regulatory Commission's recent decision in *Missouri Power & Light Co.*, FERC Docket No. ER 76-539 (October 27, 1978), indicates that wholesale rates not in "relative parity" with retail rates are presumed to be discriminatory under the Federal Power Act, and that the utility bears the burden of justifying any such disparity. The relief plaintiffs seek would not compel defendants to offer wholesale rates lower than comparable retail rates if that disparity was not justified under the Federal Power Act. Nor would it prevent them from attempting to justify a wholesale rate in excess of retail to the FERC. It would, however, preclude defendants from continuing to charge unjust and unreasonable wholesale rates in excess of the comparable retail for the substantial periods of time required for the FERC to adjudicate those rates and return them to the just and reasonable level. Moreover, it would compel defendants themselves to comply with the Federal Power Act in the first instance instead of repeatedly filing unjust, unreasonable and discriminatory rates and putting the burden of remedying them in each case entirely on the Commission.

The essence of I & M's Fourth Counterclaim, which is maintained only against plaintiff Gas City, is that Gas City has improperly annexed territories adjacent to its boundaries and thereby expanded the area served by Gas City's municipal electric utility at I & M's expense. Though the company has attempted to characterize this counterclaim as

one directed at an alleged policy of tying Gas City's water and sewage services to its electric utility service, its real complaint is that Gas City's annexation of adjacent properties has displaced I & M's retail sales of electric power in those areas. The evidence clearly establishes that Gas City had not required that any customer located outside its boundaries who takes its water or sewage services also purchase electric power from Gas City's municipal electric utility. Moreover, the evidence shows that alternate sources of water are available to entities inside and outside Gas City and that one Gas City industry, the Owens-Illinois plant, has provided its own water service for some 900 employees. Similarly, the evidence shows that septic tanks can and are used as an alternative to municipal sewage services.

Gas City's annexation policy, and the manner in which its water and sewage services allegedly serve that policy, are the real practices at issue in this counterclaim. There is, however, no evidence that any of Gas City's policies are in violation of applicable Indiana statutes. All of Gas City's policies and practices are and have been pursued in accordance with State law, and there is no allegation to the contrary. Indeed, Indiana law specifically requires that municipalities that extend their sewage services require, as a condition of extending that service, that the recipient not remonstrate against subsequent annexation. [Ind.Code Ann. § 19-2-7-16 (Burns)]

A municipal annexation policy is not a "product" within the meaning of Section 1 of the Sherman Act or "goods, wares, merchandise, machinery, supplies, or other commodity" within the meaning of Section 3 of the Clayton Act. The evidence fails to establish that Gas City has illegally tied the receipt of any product or commodity to the purchase of another. I & M therefore has failed to prove its Fourth Counterclaim.

Memorandum Opinion of the District Court, January 30, 1979

Even if proved, Gas City's alleged "tying" of electric service to water and sewer service would be exempt from antitrust liability under the doctrine of *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978).

The court held in *City of Lafayette* that municipalities are not immune from antitrust liability under *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307 (1943), simply by reason of their status as a subdivision of the state. *City of Lafayette, supra,* 435 U.S. 400, 98 S.Ct. at 1134. The court recognized, however, that its holding "does not necessarily mean that all of their anticompetitive activities are subject to antitrust restraints." *Id.,* at 414, 98 S.Ct. at 1137. Indeed, the court held that the *Parker* doctrine precludes liability for anticompetitive conduct engaged in by the State as sovereign "or by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* (emphasis added)

The court stated that evidence that the State had "authorized or directed a given municipality to act as it did" would indicate that the resultant restraints on competition were those resulting from the state acting as sovereign and thus immune from antitrust liability under *Parker. Id.,* at 414, 98 S.Ct. at 1137. See also *id.,* at 415, 98 S.Ct. at 1138. It further held that a municipality relying on such state authority need not point to specific and detailed statutory authorization. Sufficient authority instead can be implied from a general statutory mandate "to operate in a particular area,"

> "*This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit.* While a subordinate governmental unit's claim to *Parker* im-

> munity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that *an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'* " *Id.*, at 415, 98 S.Ct. at 1138 (Emphasis added)

The relevant Indiana statutes show that the State of Indiana has authorized its municipalities to operate as exclusive monopolies of electric, water, sewer, and other utilities. See Indiana Code Ann. § 8-1-2-90 (Burns). Indiana law also specifically authorizes municipalities to annex territories adjacent to their boundaries in accordance with statutory procedures, Indiana Code Ann. § 18-5-10-19 *et seq.* (Burns), thereby enabling them to expand their own municipal utilities and to replace the public utilities that may be providing service there. Finally, Indiana law specifically *requires* that cities extending their storm, sanitary and sewer services to property owners in areas adjacent to their boundaries obtain, as a condition of the extension of that service, the property owners' agreement not to remonstrate against pending or future annexations. As Indiana Code § 19-2-7-16 states:

> The contract [extending these municipal services] *shall include as part of the consideration running to the city or town, the release of the right of the owners party thereto and their successors in title to remonstrate against pending or future annexations to the city or town of the area served by the sewers and facilities,* and any person tapping into or connecting to the sewers and facilities contracted for, shall be deemed to

> thereby waive their rights to remonstrate against the annexation of the area served by the sewers and facilities. (Emphasis added)

The statutory authorization given Gas City and other municipalities to operate their own utilities is more than adequate to give rise to the *Parker* defense recognized and preserved in *City of Lafayette*. These grants clearly evidence the Indiana legislature's adoption of a state policy that allows each municipality to displace regular competition with "monopoly public service," *City of Lafayette, supra*, 435 U.S. at 414, 98 S.Ct. at 1137, and to authorize the municipalities to determine which of the utility services they wish to operate themselves and which services they will allow private utility companies to provide within their city limits. Moreover, Gas City's policy of requiring adjacent property owners accepting its sanitary and sewer services to agree not to remonstrate against future annexation is not only authorized by Indiana law, it is required. Gas City's alleged activities are thus clearly exempt from antitrust liability.

Even assuming I & M's Fourth Counterclaim were meritorious, the company has not attempted to prove any compensable damages. In order to recover damages, an antitrust plaintiff must establish injury and demonstrate the amount of damages it has sustained. Damages must be proved with sufficient particularity to allow a reasonable estimate as the basis for an award; treble damages cannot be based on speculation. See generally *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946); *Bendix Corp. v. Balax, Inc.*, 471 F.2d 149, 163 (7th Cir. 1972).

Defendants rested their case without introducing any evidence from which the court could measure or quantify I & M's alleged damages. Although I & M has asserted

that Gas City's alleged practices have caused it to lose customers, it offered no proof that would allow the Court to determine the amount of damages that allegedly resulted. For that reason alone, I & M's prayer for damages on its Fourth Counterclaim is denied.

Defendant I & M's Fifth Counterclaim appears to advance the proposition that plaintiffs' 1968 election to be served pursuant to wholesale tariff MRS also included an agreement on the part of the plaintiffs to forego any antitrust challenge to defendants' activities. Defendant I & M claims that plaintiffs' institution of Civil Actions No. S 74-72, S 75-210 and S 77-209 was "calculated to deprive I & M of the benefit of its bargain under the 1968 agreements" and that each case was instituted without reasonable basis in fact or in information or belief. Presumably this release from antitrust liability was to be perpetual; I & M has suggested no termination date after which its practices might again be subject to antitrust scrutiny.

To the extent that I & M's Fifth Counterclaim rests on a claim of sham litigation, it fails. To the extent that I & M's Fifth Counterclaim is based on the existence of some agreement constituting a prospective release from antitrust liability, it fails both on the facts and on the law. Such a claim cannot be proved. There was no such agreement, and the company has offered no evidence of one. Even if proved, such an agreement would be void as a matter of law.

I & M may contend that plaintiffs' "promise" to refrain from antitrust litigation is implied by the 1968 agreements, for the company has introduced no other evidence from which such a promise might be inferred. However, the 1968 agreements contain no prospective release from antitrust liability.

A release is generally a written agreement manifesting the intention of one party to discharge another from an existing or asserted duty. Calamari & Perillo, *Contracts*

529 (1972); 5A Corbin, *Contracts* § 1238 (1963); Restatement, *Contracts* § 402(1) (1932). While no particular language is required to make a written release effective, it is necessary that the words show an intention to discharge. *Gordon v. Vincent Youmans, Inc.*, 358 F.2d 261, 263 (2d Cir. 1965).

Rules of construction generally mandate narrow interpretation of releases and require the resolution of ambiguities against the draftsman. *Redel's Inc. v. General Electric Co.*, 498 F.2d 95, 100 (5th Cir. 1974). In view of the recognized importance of private antitrust suits in the enforcement of the antitrust laws, see, e. g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336, 91 S.Ct. 795, 805, 28 L.Ed.2d 77 (1971), this principle applies with particular force in this case. In cases in which such releases may run counter to federal antitrust policy, the necessity for clarity and specificity for releases from antitrust liability is heightened. As the Fifth Circuit stated, "While not an absolute requirement, antitrust policy certainly encourages the parties to a general release to evidence their intention to release antitrust claims." *Id.*, at 498 F.2d 101.

No such intention can be found in plaintiffs' 1968 elections to be served on tariff MRS. Those agreements do not even contain a general release, much less a release from antitrust liability. Having failed to produce any other evidence, I & M has either abandoned this claim or failed to establish it as a matter of fact.

Although an antitrust release may effectively bar antitrust claims which arose from transactions prior to the discharge, it may not be applied prospectively. This doctrine is well established in the federal courts. *E. g., Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 896 n. 7 (3d Cir. 1975); *Redel's Inc. v. General Electric Co., supra*, 498 F.2d at 99; *Gaines v. Carrollton Tobacco Board of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967); *Fox Midwest The-*

atres, Inc. v. Means, 221 F.2d 173, 180 (8th Cir. 1955); *Hunt v. Mobil Oil Corp.,* 410 F.Supp. 10, 27 n. 59 (S.D.N.Y.1975); *Marketing Assistance Plan Inc. v. Associated Milk Producers, Inc.,* 338 F.Supp. 1019, 1022 (S.D.Tex.1972). The reason for such a ban was stated succinctly in *Fox, supra,* 221 F.2d at 180:

> "Any contractual provision which could be argued to absolve one party from liability for future violations of the antitrust statutes against another would to that extent be void as against public policy. This is because the effect of such a release could be to permit a restraint of trade to be engaged in which would have impact, not simply between the parties, but upon the public as well. Such a release, if recognized as having any validity of that nature, could therefore itself operatively serve as a contract 'in restraint of trade'. Section 1 of the Sherman Act Anti-Trust Act. 15 U.S.C.A. § 1, of course, brands all contracts in restraint of trade as 'illegal'." (Citations omitted.)

The alleged agreements purportedly relied on by I & M not only do not exist, they could not be valid as a matter of law. I & M's Fifth Counterclaim is without basis in either law or fact, and therefore is denied.

Finding of Facts and Conclusions of Law

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Consolidated Civil Action Numbers S 74-72, S 75-210 and S 77-209

CITY OF MISHAWAKA, INDIANA
CITY OF NILES, MICHIGAN
CITY OF COLUMBIA CITY, INDIANA
CITY OF BLUFFTON, INDIANA
CITY OF GARRETT, INDIANA
CITY OF GAS CITY, INDIANA
TOWN OF FRANKTON, INDIANA
TOWN OF WARREN, INDIANA
TOWN OF NEW CARLISLE, INDIANA
and TOWN OF AVILLA, INDIANA,
Municipal corporations,

Plaintiffs,

v.

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION,
and INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Defendants.

FINDINGS OF FACT

1. The plaintiffs are the Cities of Mishawaka, Columbia City, Bluffton, Garrett, and Gas City, Indiana, the City of

Niles, Michigan, and the Towns of Frankton, Warren, New Carlisle, and Avilla, Indiana.

2. Each of the plaintiffs is a municipal corporation. [Stip. 1]

3. Pursuant to state statutory authority, each plaintiff owns and operates its own electric utility through which it purchases bulk power and energy at wholesale from Indiana & Michigan Electric Company and sells and distributes the electric power and energy at retail to customers within its corporate limits and in nearby areas. [Stip. 3]

4. Each plaintiff municipality and its citizens benefit by operating their own municipal electric utility in one or more of the following manners:

(1) Lower electric rates to consumers, including those resulting from the utility's absorbing some of I&M's wholesale rate increases to it by withholding or delaying rate increases to the utility's own customers [Stip. 100, 128, 146-148, 178, 186, 211-212, 228-229, 257, 284, 334];

(2) In-kind contributions and services [Stip. 98];

(3) Free or low-cost electric service to the people or to other municipal departments [Stip. 98, 126, 142, 184, 208, 232, 253, 281, 309];

(4) Lower tax rates and lower rates for other municipal services, including savings through loans by the electric utility to other municipal departments [Stip. 97, 124-125, 143, 173-175]; and

(5) Cash contributions to the municipal general fund. [Stip. 97, 124, 142, 173, 206-207, 231, 252, 280, 308, 330-332]

5. Defendant American Electric Power Co., Inc., ("AEP") is an investor-owned public utility holding company, under the Public Utility Holding Company Act of 1935. AEP owns 100% of the common stock of defendant American Electric Power Service Corporation and of several electric company subsidiaries. AEP's subsidiary operating companies generate, transmit and distribute electric power and energy within AEP's service area of approximately 41,670 square miles in the States of Indiana, Michigan, Ohio, Kentucky, Tennessee, Virginia and West Virginia. The power plants and transmission stations of AEP's subsidiary operating companies are interconnected and their operations coordinated so that they function as a single, integrated utility system, the "American Electric Power System." Wholesale municipal and rural electric cooperative customers constitute approximately 6-8% of the total AEP System load. One of AEP's wholly owned subsidiary operating companies is defendant Indiana & Michigan Electric Company ("I&M"). [Stip. 5; Ex. P-1, AEP's 1975 Annual Report, at 64, AEP's 1976 Annual Report, at 60, and AEP's 1977 Annual Report, at 58; Ex. P-6, Vassell testimony, at 247-248]

6. Defendant I&M is an Indiana corporation, which generates and transmits electric power and energy and sells electric power and energy at wholesale to plaintiffs and others, and which distributes and sells electric power and energy at retail to industrial, commercial and residential customers within a geographic area of approximately 7,740 square miles in the States of Indiana and Michigan. I&M serves South Bend and Fort Wayne, the two largest cities on the AEP System. I&M has approximately 428,165 retail customers, 15 wholesale municipal customers, including the plaintiffs, and seven rural electric cooperative customers. All of the plaintiffs are located within the area

served by I&M. [Stip. 4, 9; Ex. P-1, AEP 1977 Annual Report, at 24; Ex. P-4 at 411, 412A, 412B, and 412C; Ex. P-6 and D-106, Initial Decision, at 17]

7. Defendant American Electric Power Service Corporation ("Service Corporation") is a New York corporation that provides management, professional and technical services, including planning, engineering, design, construction supervision, financing, accounting and other legal services, among other services, to I&M and AEP's other subsidiaries. The Service Corporation's employees participate in preparing I&M's rate filings and in proceedings before state and federal regulatory commissions. [Stip. 6; Stark deposition 10/2/78 at 75-79; Patterson deposition at 36, 61-63]

8. Defendant I&M does business in the Northern District of Indiana. [I&M's Answer 7/5/78 at ¶2] The company's headquarters office is at Fort Wayne, Indiana. I&M serves customers in and around Fort Wayne, South Bend, Elkhart, and Marion, Indiana. [Ex. P-4 at 1; Tr. 586]

9. Defendant American Electric Power Service Corporation also does business in the State of Indiana. Employees in the Service Corporation's rate department participate in preparing I&M's petitions for rate increases. While present in Fort Wayne, Service Corporation employees do advisory and consultative work with I&M employees, provide I&M with tax information for its rate filings, and work with employees in I&M's rate department. An attorney on the Service Corporation's staff also has come to Fort Wayne to assist I&M's attorneys with I&M's Indiana retail rate case. Among the employees of the Service Corporation who have performed those services in Fort Wayne are persons who are not at the same time officers or employees of I&M. [Stark deposition 10/2/78 at 74-79]

10. Defendant American Electric Power Company, Inc. owns 100% of the voting stock of I&M. [Stip. 5] AEP receives annual dividends from I&M as a result of I&M's business activities in the State of Indiana. [Maloney deposition at 7] AEP's dividends from I&M and the other operating companies in the AEP system constitute virtually its sole source of income. [*Id.*] From these dividends AEP has paid its shareholders a cash dividend for 68 consecutive years, including consecutively higher dividends each year for the past 25 years. [Ex. P-1, AEP's 1977 Annual Report, at 2]

11. AEP's highest-ranking officers and directors also are officers and directors of I&M, the Service Corporation, or both. Since December 1961 the Chairman of American Electric Power Company, Inc., has also served as President of I&M and President of the Service Corporation. [Cook deposition at 8-9; White deposition at 4; Ex. P-1, AEP's 1976 Annual Report, at 32] Robert M. Kopper, I&M's Chief Operating Officer from 1968 to 1976, also was a director of the Service Corporation for approximately 12 years and served on the AEP Board of Directors from 1973 to 1976. [Kopper deposition 6/29/76 at 12-14] A. Joseph Dowd, Senior Vice President and General Counsel of the Service Company, is also Secretary of AEP, Vice President of I&M and six other operating companies of the AEP System, and a director of thirteen System companies. [Dowd deposition at 4-6]

12. Through these interlocking relationships, AEP maintains control over the Service Corporation, I&M, and the other operating companies in the AEP system. During monthly meetings of the Boards of Directors of AEP, I&M, and the operating companies, AEP "recommends" actions to the operating companies, which invariably are followed.

[Dowd deposition at 66] I&M's Chief Operating Officer, William A. Black, reports to the Vice Chairman of AEP and regards him as his "boss." [Tr. 580, 593] Senior officials of AEP system companies often cannot tell whether a given action is being taken by AEP or by one of its Indiana subsidiaries. For example, Mr. Dowd, who as General Counsel of the Service Corporation offers legal advice to AEP and its operating companies, does not know whether Donald Cook's close supervision of the real estate transactions in the State of Indiana by Indiana Franklin Realty, Inc., or one or more other AEP subsidiaries, was done in Mr. Cook's capacity as an official of AEP, the Service Corporation, I&M, or Indiana Franklyn Realty, Inc., or in some other capacity. [Dowd deposition at 106-130]

13. AEP consistently holds itself out as the parent of a "single, integrated electric utility system, the AMERICAN ELECTRIC POWER SYSTEM", consisting of its subsidiaries, including I&M, and represents that customers of the AEP System benefit from the close interrelationship of the companies in the System. [Ex. P-1, AEP's 1975 Annual Report, at 64, 4-5; AEP's 1976 Annual Report, at 60; AEP's 1977 Annual Report, at 58]

14. The relevant product market in this case is retail electric power.

15. The relevant geographic market is I&M's service area in Indiana and Michigan. [Defendants' Answer to Plaintiffs' interrogatories 8/30/78, No. 3]

16. I&M competes for the right to serve at retail all consumers in each municipality in its service area, as shown by I&M's past acquisitions of municipal electric utilities. Before 1957, the Cities of Kendallville, Decatur, Portland,

Albion, and Fort Wayne, Indiana, operated their own municipal electric utilities. Between 1967 and 1974, I&M purchased or leased the facilities of all five municipal utilities. [Defendant I&M's Answer to Consolidated Complaint at ¶9; Ex. D-144, D-166, D-174, D-200] In each of the five cities immediately after the sale or lease, the municipal utility's customers became direct retail customers of I&M. [Tr. 334-336] If an existing municipal utility on the I&M system goes out of business, its customers will become direct retail customers of I&M. [Ex. D-513 at 15, Ex. D-291 at 12, Ex. D-456 at 735-736]

17. Within I&M's service area, 95 municipalities and 36 separate townships are served by I&M directly at retail pursuant to franchise. [Ex. P-150; Defendants' Response to Plaintiffs' Interrogatory 8/30/78, No. 2] Fifteen municipalities, including the ten plaintiffs, are served by municipal electric systems. [Ex. P-4 at 412a] On this basis, I&M serves the consumers in 85% of the municipalities and 89% of the municipalities and townships within its service area directly at retail.

18. Within its service area I&M also has a monopoly of the sale of electric power at retail.

(a) In 1977, I&M's sales to ultimate consumers totaled 11,382,307,717 kWh. [Ex. P-4 at 411]

(b) I&M's 15 municipal customers purchased from the company 1,637,755,000 kWh for their own use and for resale to their own customers. [Ex. P-4 at 411] Those 15 municipalities sold less than 2,016,000,000 kWh to ultimate consumers. Of the four municipal customers generating and selling additional power, Richmond generated approximately 344,000,000 kWh. (Theodore Stichler testified that Richmond generated

70% of its requirements. [Tr. 395-397] I&M's Form 1 for 1977 reports that Richmond purchased 147,418,000 kWh from the company that year. [Ex. P-4 at 411]) The others—Bluffton, Niles, and Sturgis—generated and sold a total of less than 34,400,000 kWh—that is, less than 1/10 as much as Richmond. (Bluffton purchased more power from I&M than it sold to its own customers in 1977. [P-4 at 412A-411B; Ex. P-296 at 411] Niles had a net generation, less kWh losses, of 170,260. [Ex. P-386-I at 14] Sturgis, having generated 7% of its requirements in 1976 and purchased 118,968,000 kWh in 1977, is estimated to have generated between 9,000,000 and 33,000,000 kWh in 1977. [P-4 at 412A-413A])

(c) The seven rural electric cooperatives, who purchase all their requirements of electric power for resale from I&M, purchased a total of 783,716,910 kWh from the company in 1977. [Ex. P-4 at 413C]

(d) On the basis of the foregoing figures, I&M made 85% of the total retail sales within the geographic market which were made by I&M and its municipal customers combined and 80% of the total retail sales made in that market by all retail sellers—I&M, the municipal utilities and the cooperatives.

19. All of the plaintiff municipalities have been wholesale customers of I&M or its predecessors for many years: Gas City since 1898, Mishawaka since 1905, Niles since 1917, Franklin and Avilla since the 1920's, Columbia City and Garrett since the 1940's, and Bluffton, New Carlisle and Warren since the 1950's. [Stip. 99, 120, 144, 166, 194, 221, 283, 327; Tr. 70, 177]

20. Mishawaka, Columbia City, Garrett, Gas City, Frankton, Warren, New Carlisle and Avilla, Indiana, pur-

chase 100% of their electric power requirements at wholesale from I&M. Bluffton, Indiana, and Niles, Michigan, purchase approximately 95% of their requirements at wholesale from I&M. [Stip. 7-8]

21. None of the plaintiff municipalities owns generation facilities that can produce the power it needs. Mishawaka, Columbia City, Garrett, Gas City, Frankton, Warren, New Carlisle, and Avilla have no generators. The generators owned by Niles and Bluffton are inadequate to supply more than a fraction of the City's requirements and are used only to reduce the City's peak demands on the I&M system. [Brett deposition at 16-17; Ex. D-513 at 566-568; Blair deposition at 5-6, 18-19]

22. There are no generation facilities in the States of Indiana and Michigan from which any of the plaintiff municipalities can obtain an additional supply of electric power directly by joint ownership with other municipalities or other utilities. [Tr. 168, 312-313, 398; Kopper deposition 6/29/76 at 73]

23. None of the plaintiff municipalities can become independent of I&M for its power supply in the near future by building generators adequate to produce its requirements, either through independent action or joint action with other municipalities or other utilities. Building generators independently would not be economically feasible for any of the plaintiffs. [Ex. P-6 and D-106, Initial Decision, at 16; P-10, Initial Decision, at 6; P-60 at 26; Tr. 306-309; Howard deposition 8/3/78 at 63-64] No economically feasible joint generation facilities could be built and in operation in less than five years. [Tr. 309-310; Ex. P-10, Initial Decision, at 6]

24. None of the plaintiff municipalities can become independent of I&M for its power supply by interconnecting with neighboring electric utilities. Mishawaka, Niles, Bluffton, Gas City, Frankton, and New Carlisle are completely surrounded by the service area of I&M. [Ex. P-151a(2); Ex. D-504; Blair deposition at 26-27; Tr. 285-286, 394; Loser deposition at 3-4; Ex. D-477] Though four other utilities serve customers in areas adjacent to Columbia City, Garrett, Avilla, and Warren, each of those utilities depends on I&M for its own supply of power. Noble County REMC, which serves customers near Avilla and Garrett; Whitley County REMC, which serves customers near Columbia City; and United REMC, which serves customers in the area around the Town of Warren, purchase all their power from I&M. [Tr. 484; Frain deposition at 30-31; Walker deposition at 29-30, 60-65; Ex. D-307; Ex. D-517; Ex. P-4 at 412-B, 413-C] Northern Indiana Public Service Company, which serves customers near Garrett and Columbia City, also depends on purchases of firm power from I&M to meet the requirements of those customers already on its system. [Frain deposition at 30-31; Walker deposition at 29-30, 60-65; Ex. P-7, Transmittal Letter 12/7/77, at 4-5; Tr. 205-206, 484]

25. There are no available alternative sources from which the plaintiffs can purchase the electric power they need and wheel it over I&M's transmission lines. Defendant I&M is interconnected with Ohio Power Co., Kentucky Power Co., and through them with the other companies in the AEP System. [Ex. P-1] I&M also is interconnected with the following eight utility companies not affiliated with the AEP System: Public Service Company of Indiana, Northern Indiana Public Service Company, Indianapolis Power and Light Company, Illinois Power Company, Central Illinois Power Company, Commonwealth Edison Company, Consumers Power Company, and Cincinnati Gas and Electric Company. [Ex. P-151b; Kopper deposition

6/29/76 at 75-76] Officials of the City of Mishawaka in 1976 contacted representatives of all eight non-affiliated utilities with which I&M is interconnected, to inquire whether any of those companies can supply the electric power requirements of the City and its customers through a direct interconnection or by wheeling power over the transmission lines of I&M. [Ex. P-37 through P-44] Four of the companies refused to consider supplying the City because they are not in the wholesale power business, because they have inadequate generating capacity to serve customers outside their own service area, or, in the case of Illinois companies, because they lack authority to serve customers in the State of Indiana. [Ex. P-47 through P-50] One Illinois company refused to consider supplying the City without giving a reason. [Ex. P-51] Representatives of Public Service Co. of Indiana refused to accept any new wholesale municipal customers, stated that the company has inadequate power supplies to serve the City on a firm basis, and also gave their opinion that the cost to the City of purchasing power from PSI and wheeling it over I&M's lines would be prohibitive because of the combined cost of the wheeling fees and the power itself. [Tr. 202-204; Ex. D-456 at 8] NIPSCO's representatives stated that they had inadequate generating capacity to supply the City's needs, that NIPSCO itself is a firm power customer of I&M and that the costs of the City's obtaining power from NIPSCO through an interconnection or by wheeling would be prohibitive. [Tr. 205-206; Ex. D-456 at 8] The City officials abandoned plans to meet with representatives of the remaining company, Cincinnati Gas & Electric Co., when they heard testimony before the FPC by a senior official of AEP Service Corp., that I&M's wholesale municipal customers have no better chance of finding an alternative source of power than AEP has and that that chance is "extremely doubtful." [Tr. 201-202; Ex. P-6 at 277; Ex. D-456 at 9]

26. In 1975 the Manager of the Board of Public Works of the City of Niles asked Consumers Power Company to consider selling Niles electric power for resale. [Ex. P-391] The company refused because it had insufficient generating capacity to serve customers outside its existing service area. [Ex. P-392] Frankton's Town Board asked the Public Service Company of Indiana to consider selling power to the Town. The company refused because the cost of providing the service would be prohibitive. [Closser deposition at 44-45] None of the defendants have ever contacted or considered contacting any other utility regarding the availability of electric power to be supplied to any of I&M's wholesale customers. [Defendants' Answers to Plaintiffs' Interrogatories dated August 30, 1978, No. 40-41] No municipal electric utilities in the State of Indiana have contracts for the purchase of power that has to be wheeled to them. [Tr. 398] I&M has no contracts to wheel power for any utilities in Indiana or Michigan. [Ex. P-4 at 425] Any wheeling arrangement involving one or more of the plaintiff municipalities would still maintain that municipality's dependence on I&M's transmission system for its supply of electric power.

27. In separate litigation between the ten plaintiff municipalities and the defendants before the Federal Power Commission, the Administrative Law Judge has held that I&M, as a public utility operating within a designated service area, has a traditional public utility obligation to serve all of its customers, wholesale and retail, including all the plaintiffs, on a fair and non-discriminatory basis so long as I&M engages in the public utility business there. [Ex. P-6 and D-106, Initial Decision and Order, at 17] I&M is the only power supplier owing the plaintiffs that obligation.

28. In addition to competing against each of the plaintiffs' municipal electric utilities for the right to serve all

consumers in that municipality, I&M also competes against each of the plaintiffs' utilities for the right to serve individual customers, including those customers having a choice to enter or expand in the municipality or to expand or locate elsewhere. Where I&M serves customers at retail within the municipality or in adjacent areas, I&M competes against the municipal utility for the right to serve individual customers who might choose electric service from either I&M or the plaintiff or whose area may be annexed by the plaintiff. [Tr. 71, 74-79, 115-116, 183, 252-254, 286, 398; Ex. P-197] I&M serves nine large industrial customers at retail in the Cities of Mishawaka, Gas City, and Niles, selling retail electric power to those customers at rates lower than its wholesale rate to the plaintiffs. [Tr. 77-79, 162-165, 183, 400, 445; Ex. P-153]

29. The plaintiffs have not been served by I&M, pursuant to a regulated wholesale electric rate, since 1972. The wholesale rate filed by I&M on June 13, 1972, was in effect at the level filed by I&M from January 13, 1973, to July 26, 1976. [Stip. 33-34, 36] Before the Administrative Law Judge reviewing that rate issued his Initial Decision on August 19, 1976, holding the rate excessive, the rate had been superseded by a new wholesale rate filed unilaterally by I&M. [Ex. P-133, Stip. 34] That rate, which I&M filed before the Commission on May 28, 1976, was in effect at the level filed by I&M from July 27, 1976, through December 22, 1978. [Stip. 33-34] Though the Administrative Law Judge reviewing that rate issued an Initial Decision on cost of service issues ("Phase One") while the rate was still in effect, the parties to the proceeding excepted to his Initial Decision and no final decision has been issued by the FERC. [Ex. D-108; Tr. 107, 277] Meanwhile, that rate has been superseded by a new wholesale rate filed unilaterally by I&M. The new rate, which I&M filed before

the Commission on May 17, 1978, went into effect at the level filed by I&M on December 23, 1978, and is still in effect. [Stip. 33-34] As a result, at all times since January 13, 1973, the wholesale rate being collected by I&M from the plaintiffs has been a rate unilaterally filed by I&M and put into effect without regulatory review.

30. The Federal Commission has never approved as just and reasonable a wholesale rate under which I&M charged any of the plaintiff municipalities more than that municipality would pay under I&M's retail rates then in effect. The Federal Commission has issued final orders approving I&M's wholesale rates to its wholesale municipal customers on two occasions, both as the result of agreements between the parties. On March 15, 1968, the Federal Power Commission issued an order approving an offer of settlement by I&M and agreed to by the plaintiff municipalities, creating a Tariff MRS, which would reduce I&M's wholesale rate to the plaintiff municipalities. The wholesale rate under Tariff MRS remained in effect through 1972. [Stip. 27, 36-37; Ex. D-82] The amount I&M charged each of the plaintiff municipalities pursuant to that wholesale rate was lower than the amount that municipality would have paid under I&M's retail rates then in effect. [Stip. 37] On June 1, 1977, the FPC issued an order approving an offer of settlement agreed to between I&M and the plaintiff municipalities, providing for I&M to pay the plaintiff municipalities refunds of 39.4% of I&M's bills for the period December, 1972, through July, 1976. [Ex. P-136] If the amount of the refund is subtracted from the amount I&M charged each of the plaintiff municipalities, the resulting difference is less than the amount that municipality would have paid under I&M's retail rates then in effect. [Stip. 44]

31. The defendants have been aware since 1975 of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Conway Corporation* v. *Federal Power Commission,* 510 F. 2d 1264 (1975), holding that the Commission's authority under Section 206 of the Federal Power Act authorizes the Commission, in determining the justness and reasonableness of a supplier's wholesale rate, to consider the competitive relationship between the wholesale rate and the supplier's state-regulated retail rates. In May, 1975, I&M filed in this Court a copy of the *Conway* decision and filed two memoranda, arguing that this case should be dismissed because the *Conway* decision holds that the Court lacks jurisdiction to consider antitrust challenges to I&M's rate-setting practices. ["Second Supplemental Memorandum of Indiana & Michigan Electric Company in Support of its Motion to Dismiss the Complaint and for Alternative Relief," filed May 1, 1975, and "Memorandum of Indiana & Michigan Electric Company in Support of its Motion to Reconsider, Vacate, Set Aside and Amend the Order of May 1, 1975," filed May 9, 1975] Officials of defendant I&M having responsibility for its rate filings also have acknowledged their awareness of the *Conway* decision. [Tr. 356-357, 359; Kopper deposition 10/3/78 at 49; Stark deposition 10/2/78 at 24]

32. Although Section 205 of the Federal Power Act, as interpreted by *Conway,* requires utilities to consider and avoid any unjustified and anticompetitive disparity between their wholesale and retail rates, the defendants have taken no action to perform that statutory obligation in their standards and procedures of preparing and filing I&M's new wholesale rates to its municipal customers. [Tr. 359-360; Kopper deposition 10/3/78 at 44; Tupper deposition at 30-31, 44-45] The defendants, in preparing and filing

new wholesale rates to I&M's municipal customers, have never compared the revenues, rates of return, or realizations (cents-per-kWh) I&M would receive from its municipal customers under the new wholesale rates against those it would receive from its retail customers under I&M's actual or proposed retail rates. [Tupper deposition at 43-45] In making wholesale filings, I&M's rate department has filed the highest rate it thought it could justify and has never considered the competitive impact the new rate will have on the company's wholesale municipal customers. [Howard deposition 1/23/78 at 56-57] I&M has never adopted a policy that its wholesale rate filings should be tailored to prevent its wholesale rates from being higher than its actual retail rates then in effect. [Tr. 765-766] According to John Howard, the Service Corporation's Senior Vice President for Rates, the company tries to get every dollar it can from every customer it can as long it is entitled to that extra dollar under the rules of the Commission having jurisdiction. [Howard deposition 1/23/78 at 56-57] The only comparisons the defendants have made between I&M's wholesale and retail rates have been made at the request of the company's attorneys in preparation for this litigation. [Tupper deposition at 27-30, 44-45, 51] Those comparisons were made after I&M's most recent wholesale rate increase was filed. [*Id.*]

33. I&M filed a new wholesale rate for its municipal customers on May 28, 1976, more than a year after the Court of Appeals decision in *Conway*. The new wholesale rate was prepared by employees of both I&M and the Service Corporation, and employees of both companies filed testimony in support of it. [Stark deposition 10/2/78 at 74-79; Ex. D-65 at Volume II] That rate went into effect on July 27, 1976, at the level filed by I&M. [Stip. 33-34] During the period August, 1976, through August, 1978, in-

stead of charging plaintiffs less at wholesale than they would have paid at retail, I&M, pursuant to that rate, charged each of the plaintiffs more at wholesale than that plaintiff would have paid under I&M's retail rates then in effect, by the following amounts:

Avilla	$ 16,805.50
Bluffton	645,718.65
Columbia City	644,910.31
Frankton	81,275.38
Garrett	211,896.82
Gas City	203,895.42
Mishawaka	1,342,509.89
New Carlisle	34,602.49
Niles	810,826.77
Warren	56,950.74
Total	$4,049,461.97

[Stip. 53-54, Defendants' Answers to Plaintiffs' Interrogatories dated 5/25/78, No. 1, and Interrogatories dated 8/30/78, No. 10-31] The amount of the excess of I&M's wholesale charges over I&M's retail rates represents 12.86% of I&M's total billings to the ten plaintiffs during that twenty-five month period. [Stip. 55] Part of that excess amount was paid in the form of increased electric rates by consumers served by the ten plaintiff's municipal utilities. The rest was paid by the plaintiffs' utilities themselves as an expense. [Stip. 100, 128, 148, 186, 211, 228, 257, 284, 311, 334]

34. The defendants in this case contend that the only relevant wholesale-retail rate comparison should be between the wholesale rates I&M has charged each plaintiff and the amount that plaintiff would have paid if I&M's proposed retail rates had been in effect and billed to that plaintiff. However, during the period 1976-1978 none of I&M's pro-

posals for increases in retail rates have been approved by either the Public Service Commission of Indiana or the Michigan Public Service Commission at the level proposed by I&M. During that period none of I&M's proposed retail rates have been put into effect at the level proposed, and none have been used by I&M in billing any of its customers, wholesale or retail, at any time. [Tupper deposition at 5, 51-52; Stark deposition 10/2/78 at 59-61]

35. The defendants are aware that their retail rate proposals are based on questionable assumptions. [Ex. P1-173, P-174, P-183, P-184, P-185] The defendants, in making operating forecasts, do not rely on the figures in their own pending retail rate proposals, because the proposed increases in revenue are intangible and uncertain. [Disbrow deposition at 154-156]

36. In addition, during long periods of time I&M has had no proposed retail rates pending before the Public Service Commission of Indiana or the Michigan Public Service Commission. I&M had no proposed retail rates pending during the following months of 1976-1978: in Indiana, March, 1977, through January, 1978, and October through November, 1978; in Michigan, October, 1976, through October, 1977. [Stip. 33-34] For those months the only retail rates against which the company's wholesale charges to the plaintiffs can be compared are the actual retail rates then in effect. Thus, even if a comparison is made between I&M's wholesale rate charged to each plaintiff, on the one hand, and the amount that plaintiff would have paid under I&M's proposed retail rates during months such proposed rates were pending and under I&M's actual retail rates during months no proposed retail rates were pending, the comparison would show that during the period

August, 1976, through December, 1977, I&M charged nine of the ten plaintiffs more at wholesale than those plaintiffs would have paid at retail, by the following amounts:

Avilla	$ —	3,906.93
Bluffton	+	245,522.69
Columbia City	+	289,211.70
Frankton	+	9,061.61
Garrett	+	46,720.03
Gas City	+	58,293.32
Mishawaka	+	372,653.27
New Carlisle	+	4,452.39
Niles	+	561,338.98
Warren	+	10,761.67
Total	$	+1,583,108.65

[Stip. 48, 53] The amount of the excess of I&M's wholesale charges over I&M's retail rates, shown by that comparison, represents 7.55% of I&M's total billings to all ten plaintiffs during the seventeen-month period August, 1976, through December, 1977.

37. I&M's filing a new wholesale rate, under which it charged its wholesale municipal customers more than they would have paid under I&M's retail rates then in effect, deprived the plaintiffs' customers of benefits they otherwise would have received, impaired the ability of the plaintiffs' utilities to compete against I&M for individual customers, and forced the plaintiff municipalities to challenge the justness and reasonableness of the new wholesale rate in proceedings before the FERC and to incur litigation expenses in connection with those proceedings. Those proceedings are still continuing. [Tr. 107, 227]

38. I&M has offered no evidence, either before the Federal Commission or in this action, to justify charging the plaintiff municipalities more at wholesale than they would

have paid under I&M's retail rates then in effect. I&M's wholesale rate filing [Ex. D-65] does not attempt to justify the disparity between the company's wholesale and retail rates.

39. While I&M's wholesale rate filed in 1976 was in effect, the defendants took no action to reduce the wholesale rate I&M charged the plaintiff municipalities to the level of its retail rates, either by amending its 1976 rate filing or by making a new rate filing before the Federal Commission. [Stip. 33-34]

40. I&M filed a new wholesale rate for its municipal customers on May 17, 1978, more than three years after the Court of Appeals decision in *Conway* and nearly two years after that decision was affirmed by the Supreme Court of the United States. The new wholesale rate was prepared by employees of both I&M and the Service Corporation, and employees of both companies filed testimony in support of it. [Ex. D-66 at Volume II] According to testimony in this case by I&M's Director of Rates and Tariffs, the defendants, in preparing and filing the new wholesale rate, did not compare the revenues, rates of return, or realizations (cents-per-kWh) I&M would receive from its municipal customers under the new wholesale rate against those it would receive from its retail customers under I&M's actual or proposed retail rates. [Tupper deposition at 27-30, 44-45, 51] In preparing and filing the new wholesale rate to its municipal customers I&M did not tailor its wholesale rate filing to prevent the new wholesale rate from being higher than I&M's actual retail rates then in effect. [Tr. 765-766]

41. Between September 24, 1973, and July 14, 1975, Robert M. Kopper, Chief Operating Officer of I&M, sent

letters to the Mayor of Mishawaka, the Town Board President of Avilla, and the Town Board President of Frankton, notifying each of them that I&M would discontinue service to the municipality under their present agreement when that agreement expired. [Ex. P-35, P-81, D-359] On each occasion, representatives of I&M assured the officials of the municipality that the company would be willing to enter into a new service agreement thereafter. [Tr. 187, 268-269; Ex. P-81, D-359]

42. On September 9, 1975, Mr. Kopper sent letters to all of I&M's wholesale municipal customers not previously notified, stating that I&M would discontinue service to them under their present agreements when those agreements expire. Those letters were sent to the Mayors of Bluffton, Columbia City, Garrett, Gas City, and Niles and the Town Board Presidents of New Carlisle and Warren. [Ex. P-140; Tr. 340-341] Those letters did not give the municipal officials any assurance that I&M would enter into new service agreements with them. [*Id.*]

43. On November 10, 1975, George V. Patterson, President and Chief Operating Officer of American Electric Power Service Corporation, wrote a letter to Powers Luse, Executive Secretary of the Ohio Municipal Electric Association, stating "our current policy on sales at wholesale" as follows:

> We feel, as I am sure you do, that the primary obligation of an electric utility company is to do all it possibly can to meet the needs of its own individual customers in the area it serves who are completely dependent on it for such needs. In view of our expected future internal load growth and our continued inability to project further increments of generating capacity, we have felt that one of the steps we should take to carry

out that obligation is to begin to withdraw from the wholesale market so that the capacity now used for that purpose will be available for the needs of those in the areas for which we have primary responsibility. Accordingly, our System companies do not propose to take on any new long-term wholesale commitments and desire gradually to withdraw from the wholesale market for power sales to both investor-owned and consumer-owned utilities.

We, therefore, are suggesting that those purchasing power at wholesale from us should be taking steps to make arrangements for other sources of power. We hope that we will be able to continue to serve at wholesale in the interim while alternative arrangements are being made. All the companies in the American Electric Power System stand ready to assist our wholesale customers in obtaining alternative sources of power as well as in making the necessary arrangements to deliver that power through the American Electric Power System transmission facilities to the electric systems of the wholesale customers or to systems connected therewith. [Ex. P-85]

44. On November 14, 1975, Mr. Kopper mailed copies of the Patterson-Luse letter to the Mayors and Town Board Presidents of all of I&M's municipal wholesale customers, together with a cover letter offering the municipalities I&M's "corporation in making other arrangements for an alternative source of power." [Ex. P-84, P-224; Tr. 342-344]

45. Mr. Kopper sent the letter of November 14, urging customers to seek an "alternative source of power," to only I&M's REMC and municipal wholesale customers. [Tr. 342, 345] He did not sent the letter to the Mayors of South

Bend, Elkhart, Fort Wayne, Decatur, or any of the other municipalities where I&M serves consumers at retail. [Tr. 344-345; Kopper deposition 6/29/76 at 79-80] Though he sent the letter to the Mayor of the City of Niles, he did not send the letter to National Standard Company or any of the other industrial companies I&M serves at retail within Niles' municipal boundaries. [Tr. 345-347] He did not send the letter to any of the companies whose industrial plants I&M serves at retail within the Cities of Mishawaka and Gas City. [Tr. 347-349]

46. I&M has never refused service to any new retail customers on the ground that it would not be able to serve their requirements of electric power. [Tr. 350; Kopper deposition 6/29/76 at 56]

47. At the time Mr. Kopper sent the letter of November 14, 1975, urging I&M's wholesale municipal customers to seek an alternative source of power, none of the defendants had investigated the availability of alternative sources of power to the municipalities or the feasibility of any of the municipalities' generating their own power requirements. [Kopper deposition 6/29/76 at 60-62, 74; Defendants' Answers to Plaintiffs' Interrogatories dated 8/30/78, No. 40-41]

48. On November 18, 1975, Mr. Kopper testified at a hearing before the Federal Commission that I&M had a shortage of generating capacity and that the company was not renewing its contracts with its wholesale customers. He further testified that I&M has a greater obligation to serve retail customers than wholesale customers, and that if demand on the company's system exceeds supply, I&M will serve its retail customers in preference to its wholesale customers. His testimony (as quoted thereafter by the

Federal Commission in its order instituting an investigation) was as follows:

> Q. All right, and is it your testimony that if the wholesale customers imposed this burden on the system so that the system or let's say I don't want to confine it to the wholesale customers, let's say because of your total system load, the system became infirm do you now, I&M, have a policy of load shedding in that situation?
>
> A. Yes. If the system becomes unstable, we have a problem [sic] of load shedding.
>
> Q. What is that program?
>
> A. Well, the first step is you relieve yourself of all non-firm commitments.
>
> Q. Do any of your wholesale customers fall in that category?
>
> A. Yes, where they take capacity in excess of their contract capacity. [Ex. P-9 at 24-25]
>
> Q. Well if your system becomes infirm, it affects everybody.
>
> A. That is true. We would take prompt steps, of course, to relieve ourselves of certain burdens that we don't have a contract commitment for. [*Id.* at 24]
>
> . . .
>
> Q. Now Mr. Cook had ultimate responsibility for the decision by I&M and the decision in the other system companies of I&M to withdraw or attempt to withdraw from the wholesale power business?
>
> A. He happens to be the President of individual companies and chief executive officer.
>
> Q. Does that mean the answer is yes?
>
> A. I think that would define it as being yes. [*Id.* at 46]
>
> . . .

Q. When you made the policy decision, was it and is it your feeling that removal of I&M from the wholesale power business will solve your generation problems?

A. It would enable us to have adequate generation or reasonably adequate generation to service the individual customers in our retail area or the franchise area that we hold franchises in both the State of Indiana and Michigan. [*Id.* at 51]

49. Mr. Kopper also stated I&M's position that it has greater public utility service obligations to its retail customers than to its wholesale customers, as follows:

Q. And thus the capacity shortage would apply to retail customers as well as wholesale customers?

A. Not necessarily.

Q. Why is that?

A. Because we, in order to provide adequate capacity for individual customers which we are franchised to serve pursuant to Indiana franchise law, is that we have an obligation there first to these customers, and we would seek every means to maintain service to them. That is one reason why we are contemplating, have taken initial steps to relieve ourselves of contract commitments under wholesale contracts, so we would have the capacity to serve the individual customers, primarily those at retail.

Q. So that your testimony is that you believe there is a greater obligation on the part of Indiana & Michigan to serve retail customers than to serve wholesale customers?

A. Absolutely.

Q. Absolutely?

A. Sure. [*Id.* at 18-19]

50. An article in the November 13, 1975, issue of "Business Week" Magazine quoted Donald C. Cook, Chief Executive Officer of defendants AEP, Service Corporation and I&M, as stating their policy toward continuity of service to their municipal wholesale customers. According to the article, Mr. Cook stated, "We want to get out of the wholesale power business altogether." He also indicated that AEP companies have a higher obligation to their retail customers than to their wholesale customers. [Ex. P-62]

51. The defendants' statements created uncertainty as to the future power supply to I&M's municipal wholesale customers and created doubt as to the municipalities' ability to provide adequate and reliable electric service to their own customers. [Tr. 268-274, 403-407; Brett deposition at 144-148; Ex. P-6 and D-106, Initial Decision, at 14] The defendants' statements also indicated that I&M would give its retail customers preferential treatment over its wholesale municipal customers during shortages, and discouraged the plaintiffs and their customers from continuing to operate municipal electric utilities instead of becoming retail customers of I&M. Under those circumstances the plaintiff municipalities had no choice but to file an action to prevent I&M from withdrawing from the wholesale power business while continuing in the retail business and to establish their right to equal treatment with I&M's retail customers. [Tr. 193, 403-407; Ex. P-6, Initial Decision]

52. On December 18, 1975, the plaintiffs filed a complaint in this Court against I&M (Civil Action No. 75-210). On January 30, 1976, plaintiffs filed a complaint against defendants AEP, Service Corporation and I&M before the Federal Power Commission (FPC Docket No. E-9548). [Stip. 65]

53. In February, 1976, defendant AEP issued its Annual Report for 1975. That Report included the following discussion [Stip. 64; Ex. P-1, AEP's 1975 Annual Report, at 23-25]:

WHOLESALE SALES ARE EXAMINED

Our decision to curtail construction on two power plants—one in West Virginia and one in Indiana—as discussed earlier, due to financing limitations caused by inadequate rate relief, caused us in 1975 to examine, more critically than ever before, the relationships we may reasonably anticipate in the future between the System's generating capacity and the demands which will be placed upon it for electric power.

Our retail customers for the most part do not have the individual capability to provide their own electric energy needs. On the other hand, our wholesale customers for the most part do. For the latter customers, such as municipal electric systems and rural electric cooperatives, a means exists, or could be provided, to obtain and finance sources of power supply other than from the AEP System. Where alternate sources are, or can be made, available to our wholesale customers, we could—as a conservation measure—devote a larger portion of our generating capacity in the future to serving customers unable to provide their own.

Accordingly, the AEP System last year announced that it did not propose to take on any new long term firm commitments with wholesale customers and desired, where alternate sources of supply were available to them or could be provided, gradually to withdraw from the wholesale market, including both investor- and consumer-owned utilities. The System would expect, when excess capacity is available on a seasonal basis

or for short periods, to continue to supply short-term power to other systems. This type of transaction tends to assure a higher load factor and thus more efficient utilization of the System's resources. We advised a number of our wholesale customers that we hoped they would take steps to secure other sources of power supply upon expiration of their power-supply contracts, indicating that, while we had no present intention of cutting off their supply, it would be desirable for them to develop alternate sources. In addition, we offered to assist them in developing such alternatives and to transmit power through our lines to the points where we interconnect with their systems.

We took this step reluctantly. But, if we are to provide proper service to our customers without the capacity to arrange for other power sources, it seemed, under current conditions, to be a necessary step.

54. Acting on the plaintiff municipalities' complaint, the Federal Power Commission on August 27, 1976, instituted an investigation under Sections 205-206 of the Federal Power Act, to determine:

(a) whether or not AEP is suffering, or will in the near future, suffer from a capacity and/or energy shortage; (b) whether a curtailment plan should be prescribed for the AEP system; (c) whether I&M as well as AEP is attempting to remove itself from the wholesale electric business; and (d) whether this Commission has legal authority to deal with these issues. [Ex. P-6 and D-106, Initial Decision, at 18-19]

55. On August 24, 1976, Mayor Prickett of the City of Mishawaka wrote Jack Stark, Chief Operating Officer of I&M, accepting I&M's offer to assist the City in finding an

alternative source of electric power. [Ex. P-36] Representatives of the City and I&M met on September 23, 1976. I&M's representatives did not discuss Mishawaka's finding alternative sources of wholesale power. Instead they said that the City is a valued customer of the company and that I&M soon would submit a new proposed contract to the City providing for electric power service for a term of years. At the meeting the City officials expressed the hope that the litigation between the City and I&M would be resolved soon and that a long-term business relationship would be reestablished between them. [Ex. D-456 at 9-10] After the meeting I&M offered the City a new proposed contract. That proposed contract was later found unjust, unreasonable and discriminatory in proceedings before the FERC. [Ex. P-10, FERC Docket No. ER76-792] Meanwhile, City officials had contacted the eight non-affiliated utility companies with whom I&M is interconnected to inquire whether any of those companies can supply Mishawaka's electric power requirements. [Ex. P-37 through P-44] They were unsuccessful in finding any alternative source of power. [Ex. P-47 through P-51; Tr. 202-206; Proposed Finding of Fact 25]

56. Administrative Law Judge Samuel Kanell conducted hearings on the issues defined by the FPC, arising out of the plaintiffs' complaint (FPC Docket No. E-9548). During those hearings George S. Vassell, AEP Service Corporation's Senior Vice President-System Planning, testified as follows:

> Q. [Y]ou indicate that the American Electric Power System will not be able to cure its deficiency problems by going outside the system and making power purchases subsequent to the winter of—during the early and middle 1980's.

Is that a fair summarization of your testimony?
A. That is correct, yes.

Q. Would the municipal wholesale customers be able to go outside the American Electric Power System and purchase excess power from any other system during the same time period?

A. Well, I would think the municipal and wholesale—I am sorry, the municipal and cooperative systems would have the same amount of problem that we would to try to buy from somebody else.

. . .

Q. Regardless of the wheeling arrangements that may or may not be able to be consummated, it is still your testimony that that is extremely doubtful that they would be able to find power?

A. I would say that the difficulty of purchasing power from other utilities that cooperatives and municipals may encounter would be similar to the problem that we would have, yes.

Q. Which you characterize as "extremely doubtful"?

A. Right.

Presiding Judge: You are saying they would have no better way to buy power than you have?
The Witness: Yes. [Ex. P-6 at 275, 277]

Mishawaka officials heard the foregoing testimony and discontinued contacting other utilities to seek an alternative source of power. [Tr. 202; Ex. D-456 at 9]

57. Judge Kanell issued his Initial Decision on May 10, 1977. He found that AEP's policy, as disclosed by the evidence

is a clear and unambiguous notice to its wholesale customers of AEP's intention to withdraw from the whole-

sale business. [Ex. P-6 and D-106, Initial Decision, at 12]

He found,

> While no wholesale customers served by AEP have been denied service, the actions taken by AEP concerning its wholesale customers has necessarily created apprehension, uncertainty and potential prejudice with respect to future continuity of service. Further, the fact that the wholesale customers may have the theoretically greater ability to obtain alternate sources of power in contrast to AEP's retail customers does not appear to be a valid criteria for differentiating between these classes of customers within the meaning of Section 205(b) *supra*. The fact is that AEP is serving individual industrial firms that have power requirements comparable to many of these wholesale municipal customers.

Judge Kanell held,

> As a public utility operating within a designated service area, AEP has the traditional public utility obligation to serve all customers on a nondiscriminatory basis. AEP has not undertaken to seek to demonstrate that termination of service to wholesale customers would be in the public interest. The contention that the municipally-owned electric distribution systems could readily shift to other sources of electric supply, is unrealistic in light of the unavailability of alternate sources of supply and the materially higher costs that the municipalities would encounter if they were to consider the construction of costly and less efficient local electric generating power stations. [*Id.* at 16]

. . .

> The complainants in this proceeding are municipal electric distribution systems that provide service generally within their corporate limits. They are total requirements customers of AEP and have no practical alternative to AEP power. There is no evidence in this record to dispute the apparent understanding that these wholesale customers initially took service from AEP based on the premise that they would continue as full requirement customers of AEP indefinitely. Therefore, they have had no reason to plan for alternate sources of power.
>
> Further, in light of current energy shortages it would not be consistent with the public interest to require these municipal systems to construct more expensive generating plants when such construction can be undertaken at lower cost and more efficiently through larger units that could be constructed by AEP or its subsidiaries. [*Id.* at 17]

The Judge also found,

> The service areas of the municipal utilities are located generally within the area served by AEP and it may be reasonable to conclude that if electric service by AEP to any of these municipal distribution systems were disrupted, AEP would develop arrangements to directly serve the patrons of these local systems in the same manner that AEP has been serving several large industrial firms located within the service areas of some of these municipal systems. If this were to occur, there would be no change in the total power demands on the AEP system. [*Id.* at 17]

Judge Kanell noted that even AEP had acknowledged that it was not aware of any generating company in the area

with sufficient capacity to meet plaintiffs' needs. [*Id.* at 13] Moreover, as the Judge found,

> This situation inhibits growth within the service area of these wholesale customers and frustrates any effort to encourage new industry or commercial activity to locate within the service area of the complainants. [*Id.* at 14]

Judge Kanell issued the following order [*Id.* at 20-21]:

1. AEP shall treat all classes of customers equitably and fairly and shall cease and desist from any actions which will have the effect of singling out any class of customers for the purpose of indicating directly or indirectly that the continuity of service for only that class of customers may be in jeopardy;

2. AEP shall submit to the Commission for review and consideration within 60 days of the effective date of this Initial Decision a proposed curtailment plan that would apply the effect of any electric generating shortfall equitably and fairly to all classes of customers based on end use of electric power; and

3. That AEP shall submit to the Commission reports every six months, beginning on December 31, 1977, outlining (a) the current status of AEP system-wide electric power requirements, (b) AEP system generating capacity, (c) AEP's program to alleviate any possible shortfall of generating capability and (e) related matters.

58. Prior to 1975 I&M served each of the plaintiff municipalities under a signed agreement for a specified period, providing for I&M to supply all the electric service required

by the municipality for its use or for resale to its customers. [Stip. 28-29; Ex. P-140, D-10, D-12, D-13b, D-14b, D-16b, D-18, D-20, D-22, D-26, D-28]

59. On September 9, 1975, I&M sent letters to all plaintiffs not previously notified, that I&M intended to discontinue serving them under their present agreements when those agreements expire. [Ex. P-140; Tr. 340-341]

60. Between November, 1975, and February, 1976, the defendants notified the plaintiffs that they intended to withdraw from the wholesale market for electric power sales. [Tr. 187-193; Ex. P-1, AEP's 1975 Annual Report, at 23-25; Ex. P-9, P-62, P-84, P-85, P-224]

61. Claiming that its contract with the City of Mishawaka expired September 23, 1976, I&M filed with the Federal Power Commission on July 16, 1976, an unsigned "service agreement" for Mishawaka, to go into effect September 24, 1976. That filing, unlike past contracts between the City and I&M, provided for the company to serve the City on a non-firm day-to-day basis and attempted to impose a limit on the quantity of power I&M would be required to sell the City at current rates. [Stip. 74; Ex. P-10, Initial Decision, at 3; Ex. D-109, FPC Docket No. ER76-792]

62. I&M's filing of an unsigned service agreement for Mishawaka caused uncertainty as to the future power supply of Mishawaka, as well as the Towns of Avilla, Frankton, and Warren, whose contracts with I&M were due to expire within the next two years, and all other municipal wholesale customers of I&M. [P-140]

63. The FPC ordered an investigation into the justness and reasonableness of I&M's unsigned service agreement for Mishawaka [Stip. 75; Ex. P-10, Initial Decision, at 3]

and Mishawaka intervened in the proceeding before the FPC, challenging the justness and the reasonableness of the provisions of the unsigned service agreement. [Stip. 75; Ex. P-10, Initial Decision, at 3] All of the plaintiff municipalities shared in paying the expenses of Mishawaka's litigation in the proceeding. [Tr. 412]

64. The FPC ordered an investigation into the justness and reasonableness of I&M's unsigned service agreement for Mishawaka. [Stip. 75; Ex. P-10, Initial Decision, at 3] Before hearings could be held, I&M on January 7, 1977, filed a substitute "service agreement" for the City of Mishawaka. [Stip. 76; Ex. P-10, Initial Decision, at 3; Ex. D-110] That agreement provided for a term of three years and, like the unsigned service agreement, attempted to impose a limit on the quantity of power I&M would be required to sell the City at current rates. [Ex. P-10, Initial Decision, at 3-4]

65. The three-year term, followed by the possibility of going on day-to-day service, and the quantity limitation continued to threaten the plaintiffs' right to adequate, continuous electric service from I&M and cast doubt on their ability to furnish adequate and reliable service to their own customers. [P-10, Initial Decision, at 3]

66. On February 4, 1977, the Commission ordered hearings to determine the justness and reasonableness of the substitute service agreement. The hearings were held on September 27-29, 1977, before Administrative Law Judge Sherman P. Kimball. Officials of I&M and the Service Corporation testified in support of the substitute service agreement. [P-10, Initial Decision, at 5, 7, 10] Mishawaka challenged the three-year contract term, insofar as it attempted to limit I&M's obligation to serve the City, and challenged the attempted limitation on the City's power supply. On May 4, 1978, Judge Kimball issued his Initial Decision,

holding that (1) the three-year contract term is unjust, unreasonable, and discriminatory and should be replaced by a ten-year term, and (2) the "maximum permissible reservation" provision, which sets a ceiling on the quantity of power I&M can be required to sell the City at each delivery point, is unjust, unreasonable, and discriminatory and should be stricken. [Stip. 77; Ex. P-10, Initial Decision]

67. I&M has filed with the Federal Energy Regulatory Commission exceptions to Judge Kimball's Initial Decision and Order. [Stip. 77] The filing of the appeal relieves I&M from the present obligation of complying with the order. [18 CFR §§ 1.30-1.31]

68. Since the decision, the new agreements I&M has offered Mishawaka and the other plaintiffs incorporate the terms held unjust, unreasonable, and discriminatory in Mishawaka's case. [Stip. 78; Ex. D-66a at First Revised Sheets No. 16-21; Tr. 412-413] None of the municipalities has accepted that offer. [Stip. 78] As a result, the contracts between I&M and the Towns of Avilla, Frankton and Warren have expired without being replaced by a new service agreement. [Ex. P-81, P-326, D-359, P-409]

69. By challenging the Judge's decision before the FERC and continuing to offer only contracts incorporating the terms held unjust, unreasonable, and discriminatory, I&M has prolonged the plaintiffs' uncertainty regarding their continued electric power supply from I&M and their ability to furnish adequate and reliable power to their own.

70. The wholesale rate I&M charged each of the plaintiffs during the period December, 1972, through July, 1976, was set unilaterally by I&M in its filing before the Federal Power Commission on June 13, 1972 (FPC Docket No. E-7740). [Stip. 33] Employees of both I&M and the Service

Corporation participated in preparing and filing that wholesale rate, and employees of both companies testified in support of it. [Ex. D-64A-C]

71. The plaintiffs intervened in the administrative proceeding commenced by the FPC to investigate that filing and challenged I&M's new wholesale rate as unjust, unreasonable, and discriminatory. [Tr. 80-83] The litigation resulted in an Initial Decision by Administrative Law Judge George P. Lewnes, August 19, 1976, holding that I&M's wholesale rates to the plaintiffs during that period were excessive, unjust, and unreasonable. [Ex. P-133, D-108]

72. In 1977 the parties settled the proceeding involving I&M's wholesale rates to the plaintiffs for the period 1972-1976. [Ex. P-134, P-135, P-136] As a result of the settlement, I&M paid the plaintiffs refunds, as follows:

Avilla	$	524.35
Bluffton		189,985.00
Columbia City		181,900.13
Frankton		42,245.61
Garrett		90,742.90
Gas City		79,639.56
Mishawaka		767,143.53
New Carlisle		3,880.02
Warren		19,155.10
Niles		303,295.48
Total		$1,678,511.68

[Stip. 43]

73. The settlement, providing for refunds, was based on the findings in Judge Lewnes' Initial Decision, determining the just and reasonable wholesale rate to I&M's municipal customers. [Ex. P-134 at 3-5]

74. During the period January, 1973, through July, 1976, I&M charged the City of Columbia City $45,172.39 more at wholesale than the City would have paid under I&M's retail rates then in effect. During the same period, I&M charged the City of Niles a total of $243,755.74 more at wholesale than the City would have paid under I&M's retail rates then in effect. [Stip. 42]

75. By charging each of the plaintiffs unjust, unreasonable, and discriminatory rates and by charging Columbia City and Niles more at wholesale than they would have paid under I&M's retail rates from December, 1972, through July, 1976, I&M and the Service Corporation deprived the plaintiffs and their customers of benefits they otherwise would have received, impaired the ability of the plaintiffs' municipal utilities to compete against I&M for individual customers.

76. From 1957 to 1975, I&M purchased or leased the municipal utilities of the following five cities in Indiana: Kendallville (1957), Decatur (1959), Portland (1963), Albion (1966), and Fort Wayne. [Defendant I&M's Answer to Consolidated Complaint at ¶9] After each of these acquisitions, I&M began to serve directly at retail the customers formerly served by the municipal utility, thereby expanding its monopoly in retail sales of electricity. [Tr. 334-336] During that same period, I&M attempted to purchase the municipal utility of South Haven, Michigan, but the citizens of that city decided in a referendum vote not to sell. [Ex. P-80; Patterson deposition at 103] Defendants also have attempted to purchase several other municipally-owned utilities in Indiana. [Ex. P-55; Tr. 464-468]

77. Although officials of the defendants have sought to characterize their acquisition policies as passive in nature

[Cook deposition at 20; Patterson deposition at 79], the evidence shows the contrary. I&M has sought to encourage the sale of municipal utilities and aggressively pursued the possible acquisition of municipal utilities in cases where acquisition seemed possible. Defendants have monitored the operations of their wholesale municipal customers and have been alert to possible acquisition opportunities. [Ex. P-55, P-95] I&M brought one former official, Calvin Hill, out of retirement for the specific purpose of contacting newly-elected mayors of various municipalities to find out if any were interested in selling the municipality's electric utility. Mr. Hill met with Keith Dowell, the newly-elected Mayor of Columbia City, Indiana, to encourage the sale of its utility to I&M. [Tr. at 464-468] I&M's efforts to promote the sale of the municipal utility of South Haven, Michigan, included the reactivation of a "Citizens Committee" "strategically made up of a cross section of the community," the staffing of an I&M headquarters in South Haven and the offer of I&M's personnel and facilities to the "Citizens Committee." I&M's plans also included detailed polling of citizen sentiment "through the efforts of the Citizens' Committee" and the enlistment of a group of "capable, loyal, women willing to work part-time and be reimbursed if necessary" who would engage in a highly organized and sophisticated "get out the 'Yes' vote." [Ex. P-80]

78. Defendants' persistent and ultimately successful efforts to acquire the Fort Wayne Municipal utility demonstrate the aggressive nature of their takeover policies. Although I&M did not lease the facilities of the Fort Wayne municipal utility until 1975, defendants actively worked toward that goal for many years. Defendants recognized that the lease of the Fort Wayne utilities, rather than its purchase, would offer a more attractive prospect to Fort Wayne's voters and would, at the same time, accomplish defendants' major goals. [Ex. P-59 at 541-542] Defendants also recognized that their efforts to acquire the Fort Wayne

utility might be frustrated by Fort Wayne's expansion of its own capabilities and that the relationship between I&M's rates and the rates of the Fort Wayne utility would be an important consideration in the determination to sell or lease the utility. [*Id.* at 536] Defendants also recognized that I&M's rate strategies could have a substantial impact on public support of municipal sale or lease of the utility. [*Id.* at 522, 526, 535, 536, 540, 546, 551]

79. With these considerations in mind, defendants constantly monitored the progress of the Fort Wayne utility, and took every opportunity to enhance the prospects of ultimately purchasing or leasing that utility. Harold R. Johnson, the Director of Public Relations for the Service Corporation [Johnson deposition at 4] began considering this possibility as early as 1953, and he and other officials of the defendants repeatedly discussed the matter thereafter. [Ex. P-59 at 544] In 1957, defendants commissioned a public opinion survey to determine popular opinion on the issues related to the sale of the municipal utility. [*Id.* at 544-545] In 1965, Donald C. Cook solicited the views of key Service Corporation personnel regarding the major arguments that could be raised against a proposed sale of Fort Wayne's municipal utility. [*Id.*] Harold Johnson recognized that the citizens of Fort Wayne had a strong sense of loyalty and pride of ownership in their utility and recommended a number of actions designed to overcome this loyalty and pride of ownership. [*Id.* at 544-547] Other Service Corporation personnel recommended various possible actions that would enhance the prospects of the sale of that utility and would minimize or counter adverse public reaction to sale. [*Id.*] The defendants constantly watched the progress and profitability of the Fort Wayne utility. [Ex. P-118, P-119, P-120, P-172, P-101, P-106, P-148, P-149, P-237] Defendants likewise monitored the

retail rates charged by the Fort Wayne utility and compared those rates to I&M's own. [Ex. P-71, P-102, P-106, P-147, P-166, P-171, P-193, P-220, P-237, P-255] Defendants persistently and aggressively discouraged the expansion of Fort Wayne's generation capability, urging the City instead to increase its purchase of power from I&M and thus its dependents on the company. [Ex. P-158, P-159, P-160, P-161, P-162, P-163, P-164, P-165, P-198, P-200, P-201, P-202, P-206, P-207] Defendants offered additional incentives to encourage Fort Wayne's lease of its municipal utility to I&M. [Ex. P-177, P-123]

80. I&M's lease of the Fort Wayne municipal utility resulted in its taking over the customers formerly served at retail by that utility and expanding I&M's retail sales by approximately 33,000 retail accounts. [Ex. P-124]

81. Defendants still have a policy of expanding I&M's retail sales within the geographic market it serves by taking over the facilities of municipally-owned electric utilities and thereby enabling I&M to serve directly at retail the customers previously served by those municipal utilities. The testimony of defendants' officials recognizes their practice of acquiring the facilities of municipal utilities and that they remain interested in acquiring municipal utilities today. Donald C. Cook, Chairman of the Board of AEP and President of both I&M and the Service Corporation during most of the period at issue in this case [Cook deposition at 8-9], testified that the AEP System had a policy of seeking to acquire municipal utilities that it regarded as "inefficient" at the time he became Chairman of AEP and Chief Executive Officer of the operating companies in the AEP System. [*Id.* at 35] He later altered that policy [*Id.* at 33] to require that the operating companies only consider the acquisition of municipal utilities that were "either in dis-

tress or [where] distress was incipient." [*Id.* at 19] This change reflected his opinion that regulatory approval for acquisitions would be easier to obtain in distress cases. [*Id.* at 20-22] The defendants' general policy regarding acquisition of municipal utilities remained unchanged during the entire period that Mr. Cook was Chairman of AEP and President of I&M, the Service Corporation and the other operating companies in the AEP System. [*Id.* at 50] Richard E. Disbrow, Vice Chairman of the Service Corporation and a vice president of each of the major operating companies in the AEP System [Disbrow deposition at 4], testified that the basic attitude of the operating companies of the AEP System toward acquisition of municipal systems has remained the same, and that those companies will entertain any potential municipal acquisition that appears to be mutually advantageous. [*Id.* at 120]. William A. Black, Executive Vice President of I&M [Tr. at 578], also testified that I&M will consider the acquisition of any municipal utility where the municipality expresses an interest in selling [Black deposition at 32] and that this policy has remained essentially the same since 1964. [Tr. at 608-609] I&M is currently considering the purchase of the municipal utility of Avilla, Indiana, one of the plaintiffs in this case. In November of 1977 I&M officials advised officials of Avilla that they would have to obtain permission from New York to bid on the Avilla system, and that if permission to bid were obtained from New York, I&M would conduct a physical inventory of the system and a review of its previous billings. [Tr. at 493] I&M subsequently conducted an inventory of the Avilla system. [*Id.*] I&M personnel have estimated the approximate value of the utility, and of the price that they believe Avilla would accept [Ex. P-141, P-142] I&M's failure to submit a bid on the Avilla system is due to its involvement in other matters, not lack of interest. [Stark deposition 10/2/78 at 117]

82. The defendants' acquisition policy reflects their recognition that the AEP System's total revenues will be increased by acquiring municipal utilities and serving their former customers at retail. For example, the Service Corporation estimated that as of 1963 the AEP System could increase its total revenues by approximately $24,000,000 if its operating companies took over their wholesale customers and the other municipal utilities adjoining their service areas. [Ex. P-56] Richard E. Disbrow, who made that estimate for AEP, acknowledged that he calculated the increase in revenues by computing the difference between the operating companies' revenues obtained from their wholesale sales to the municipalities and the greater revenues the operating companies would obtain by serving the customers of those municipalities directly at retail. [Disbrow deposition at 82, 87-88]

83. Defendants recognize that profitable and efficient utilities do not represent likely prospects for purchase. [Patterson deposition at 115-116] They also are aware of the importance of rate comparisons in the decision of the voters of a municipality regarding the possible sale of its utility. [Patterson deposition at 111-112; Ex. P-59, P-79] They, therefore, monitor the progress and profitability of their remaining municipal customers. [Ex. P-94, P-96, P-97, P-100, P-105, P-107, P-109, P-110, P-111, P-112, P113, P-114, P-115, P-116, P-117] They also compare the municipalities' retail rates to their own customers and I&M's retail rates. [Ex. P-93, P-216, P-217, P-114] Defendants know that their wholesale rates to these municipalities invariably will affect the retail rates offered by the municipalities and the profitability of those municipal utilities. [Ex. P-109, P-111, P-112, P-114, P-116]

84. Defendants' other discriminatory practices also impair the reliability and profitability of the plaintiff munici-

pal utilities, and force them to engage in constant and costly litigation in order to survive. If any of the plaintiffs go out of business, the retail customers of that municipal utility will become direct retail customers of I&M. [Ex. D-513, at 15; D-291 at 12; D-456 at 735-736] The totality of defendants' anti-competitive acts and practices thus serve as a means of implementing the continued expansion of I&M's monopoly in retail sales by damaging plaintiffs' ability to offer reliable and continuous service to its customers, impairing plaintiffs' ability to compete with I&M, depriving the plaintiffs of the benefits they otherwise would obtain from operating their municipal utilities, and diminishing the resolve of the officials and citizens of the plaintiff municipalities to continue to operate their utilities.

85. This Court has the most serious reservations as to the credibility of several witnesses who are or were in highly placed management positions in the Indiana & Michigan Electric Company. It is most difficult to believe that some of them could be so high in management and know so little about the policies and practices of that corporation.

86. Plaintiffs' litigation has been instituted and maintained in good faith. Plaintiffs' consolidated complaint raises substantial claims under the federal antitrust laws. Based on evidence presented at trial, a jury would be entitled to find in plaintiffs' favor on those claims. [Court's ruling on defendants' motion for dismissal, Tr. at 878]

87. This is not sham litigation. Plaintiffs' lawsuits were not instituted without reasonable basis in fact or belief that the defendants had committed violations of the federal antitrust laws and that plaintiffs are entitled to relief.

88. Throughout this litigation, plaintiffs have advanced general principles of law that may be equally applicable to defendant I&M's other municipal wholesale customers who are not plaintiffs in this case.

89. Plaintiffs seek no relief that would compel defendant I&M to charge any non-plaintiff municipal wholesale customer a different rate not justified or required by the antitrust laws and by the Federal Power Act.

90. Defendant I&M has failed to prove the allegations of its First Counterclaim that this litigation was instituted and maintained for the purpose of inducing I&M to sell its electric power and energy to plaintiffs at prices that are lower than the prices I&M would charge its other wholesale customers, in violation of Section 2(f) of the Clayton Act, 15 U.S.C. § 13(f).

91. I&M has failed to prove the allegations of its Second Counterclaim that plaintiffs combined and conspired to do the acts alleged in its First Counterclaim, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

92. I&M has failed to prove the allegations of its Third Counterclaim that this action was instituted and maintained to fix the price at which I&M sells electric power and energy at retail, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

93. Plaintiffs' action does not challenge I&M's retail rates, and plaintiffs have sought no relief that would require I&M to fix the rates it charges its retail customers.

94. I&M has failed to prove that plaintiffs have instituted and maintained this action for the purpose of fixing

the price at which I&M sells electric power and energy so that I&M's rate to the plaintiffs would be substantially lower than I&M's rates to its retail customers.

95. Plaintiffs' requested relief would not require that I&M charge plaintiffs a substantially lower rate than the rates it charges its retail customers having comparable consumption and load characteristics.

96. Plaintiffs' requested relief would not require I&M to charge any wholesale rate that is not "just and reasonable" under Section 205 of the Federal Power Act. 16 U.S.C. § 824d(a).

97. I&M has abandoned its Fourth Counterclaim against the Cities of Mishawaka, Columbia City, Bluffton, Garrett, and Niles and the Towns of Warren, New Carlisle, Frankton, and Avilla.

98. I&M's Fourth Counterclaim is directed at the annexation policies of Gas City and the fact that, by annexing adjoining areas, Gas City has expanded the areas in which its municipal utility sells electric power.

99. Although residents of Gas City generally must take available municipal services, Gas City has not required that any customer located outside its boundaries that takes water or sewage services also purchase electricity from its municipal utility. Gas City has not made the purchase of electric services a condition of those customers' receipt of its water or sewage service. [Gas City's Responses to Defendants' Interrogatories of July 7, 1978, Nos. 88a and 89, D-563; Linn deposition at 60-61]

100. Alternate sources of water supply are available to consumers located outside Gas City and can be and have

been utilized by individuals, residential developments, and industrial plants inside Gas City and in adjoining areas outside the City. Owens-Illinois, an industrial plant in Gas City with some 900 employees, has its own water facilities, as have a number of residential projects in areas adjacent to the City. [Ex. P-366 at 40, 66; P-416 at 16, 17; Stichler deposition at 8-9, 22] Individual residents in residential areas adjoining Gas City also have constructed septic tanks to provide for their own sewage disposal. [P-416 at 16, 17]

101. I&M has failed to prove that Gas City possesses sufficient economic power with respect to its water and sewage services to appreciably restrain competition for electric services, or that Gas City has conditioned its sale of water or sewage services to persons residing outside its municipal boundaries on those persons' agreement to purchase electric power from its municipal electric utility.

102. I&M has failed to prove any compensable damages relating to its Fourth Counterclaim against Gas City, Indiana.

103. I&M has failed to prove the allegation on which its Fifth Counterclaim rests, that the plaintiffs' 1968 election to be served pursuant to tariff MRS included any agreement on their part to refrain from challenging the defendants' practices in federal antitrust litigation.

104. The agreements in which each of the plaintiffs elected to be served pursuant to tariff MRS contain no agreement or undertaking by any of the plaintiffs to refrain from challenging the defendants' practices in federal antitrust litigation.

105. I&M has offered no evidence from which any such agreement by any of the plaintiffs could be inferred.

106. I&M has failed to prove facts necessary to sustain any of its counterclaims.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action under the provisions of Section 4 and 16 of the Clayton Act, 15 U.S.C. Sections 15, 26.

2. This Court has jurisdiction over the defendants Indiana & Michigan Electric Company, American Electric Power Service Corporation, and American Electric Power Company, Inc., under the provisions of Section 12 of the Clayton Act, 15 U.S.C. § 22, and Indiana Trial Rule 4.4.

3. Defendant Indiana & Michigan Electric Company has a monopoly over the business of selling electric power at retail within the relevant geographic market. [*Otter Tail Power Company* v. *United States*, 410 U.S. 366, 93 S.Ct. 1022 (1973)]

4. Defendant Indiana & Michigan Electric Company has a monopoly of the supply of electric power to each of the plaintiff municipalities. [*Otter Tail Power Company* v. *United States*, 410 U.S. 366, 93 S.Ct. 1022 (1973)]

5. The Court finds by a preponderance of the evidence that the defendants have monopolized and attempted to monopolize the business of selling electric power at retail within I&M's service area and in each of the plaintiff municipalities.

6. Under the Federal Power Act, the law of the States of Indiana and Michigan, and the common law, the defendant Indiana & Michigan Electric Company has an obligation as a public utility to serve all classes of customers, including its wholesale municipal customers, without discrimination and as long as it continues to conduct a public utility business in their area. [Ind. Code Ann. Sections 8-1-2-96, 8-1-2-105; *Michigan Public Service Co.* v. *Maddy,* 279 N.W. 874 (Mich. 1938); *Ten Broek* v. *Miller,* 216 N.W. 385 (Mich. 1927); *City of Mishawaka, Indiana, et al.* v. *American Electric Power Co., Inc., et al.,* Initial Decision, FERC Docket E-9548 (1977); *United Fuel Gas Company* v. *Railroad Commission,* 278 U.S. 300, 309 (1929)]

7. The defendants have injured each of the plaintiffs in its business and property by reason of their violation of 15 U.S.C. Section 2, within the meaning of Section 4 of the Clayton Act. [15 U.S.C. Section 15]

8. The defendants' violation of 15 U.S.C. Section 2 threatens each of the plaintiffs with loss and damage, within the meaning of Section 16 of the Clayton Act, and the conditions and principles under which injunctive relief is granted by courts of equity against threatened conduct that will cause loss or damage, are present in this case. [15 U.S.C. Section 26]

9. In view of this Court's finding that plaintiffs' antitrust actions have been instituted and maintained in good faith, and are not sham litigation, I&M is precluded, as a matter of law, from maintaining its First, Second, Third and Fifth Counterclaims. (*California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 92 S. Ct. 609 (1972))

10. Municipal annexation of properties, which is the object of I&M's Fourth Counterclaim, is not a product within the meaning of Section 1 of the Sherman Act, 15 U.S.C. § 1, or "goods, wares, merchandise, supplies or other commodity" within the meaning of Section 3 of the Clayton Act. 15 U.S.C. § 14.

11. I&M's Fourth Counterclaim, maintained against only Gas City, Indiana is precluded by the doctrine of *Parker* v. *Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943). (*City of Lafayette, La.* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123 (1978))

14. The planned expansion of municipal corporate boundaries to encompass nearby developed land and land on which development is imminent is a legitimate governmental function, specifically authorized by the laws of Indiana. (Ind. Code Ann. § 18-5-10-19 *et seq.* (Burns))

15. Indiana law specifically requires that cities extending storm, sanitary or combination sewer service to areas adjacent to their municipal boundaries obtain, as a condition for that service, the property owners' agreement not to remonstrate against pending or future annexation: (Ind. Code Ann. § 19-2-7-16 (Burns)) Indiana law also authorizes the developers' construction of sewage facilities to serve areas adjacent to Gas City. (Ind. Code Ann. § 8-1-2-89 (Burns)) Under Indiana law, Gas City can choose to operate the sole utilities offering service within its boundaries, or exclusively to operate any one or combination of such municipal utilities. (Ind. Code Ann. § 8-1-2-90 (Burns))

16. The alleged agreement on which I&M's Fifth Counterclaim is premised, if proved, would be void as a matter of law. (*Three Rivers Motors Co.* v. *Ford Motor Co.*, 552

F. 2d-885, 896, n. 27 (3d Cir. 1975); *Redel's Inc.* v. *General Electric Co.*, 498 F. 2d 95, 99 (5th Cir. 1974); *Gaines* v. *Carrollton Tobacco Board of Trade, Inc.*, 386 F. 2d 757, 759 (6th Cir. 1967); *Fox Midwest Theatres, Inc.* v. *Means*, 221 F. 2d 173, 180 (8th Cir. 1955); *Hunt* v. *Mobile Oil Corp.*, 410 F. Supp. 10, 27, n. 59 (S.D. N.Y. 1975); *Marketing Assistance Plan, Inc.* v. *Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1022 (S.D. Tex. 1972))

Enter January 30, 1979.

/s/ ALLEN SHARP

JUDGE, UNITED STATES DISTRICT COURT.

Order and Judgment of the Court of Appeals (August 16, 1977)

OPINION BY JUDGE CUMMINGS

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

August 16, 1977

Before:

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

No. 76-2226

CITY OF MISHAWAKA, INDIANA, *et al.*,
Plaintiffs-Appellees,

vs.

INDIANA & MICHIGAN ELECTRIC COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana

South Bend Division

No. S-74-72-Civil

Judge Grant and Judge Sharp

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the orders of the said District Court in this cause appealed from on May 1, 1975, and October 22, 1976, are affirmed, with costs, in accordance with the opinion of this court filed this date.

Opinion of the Court of Appeals (August 17, 1977)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 76-2226

CITY OF MISHAWAKA, INDIANA, *et al.*,
Plaintiffs-Appellees,

v.

INDIANA & MICHIGAN ELECTRIC COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. S-74-72-Civ.—ROBERT A. GRANT and ALLEN SHARP, *Judges.*

ARGUED APRIL 28, 1977—DECIDED AUGUST 16, 1977

Before CUMMINGS, TONE and BAUER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* One Michigan and nine Indiana municipalities, members of the Indiana & Michigan Municipal Distributors' Association, filed this antitrust action against defendant, a vertically integrated electric power company which generates, transmits and delivers electric power both to its wholesale customers, including

plaintiffs, as well as directly to its own retail customers. Each plaintiff operates its own electric utility through which it purchases wholesale electric power from defendant, then selling and distributing it at retail to industrial, commercial, and residential customers within its corporate limits and in nearby areas.

According to the complaint, defendant is the only firm within its service area that transmits and wholesales electric power and is the plaintiffs' only outside source of supply for wholesale electric power. Eight of the plaintiffs depend on defendant for all the electric power they distribute and sell to their retail customers. The other two plaintiffs, which operate generating facilities, depend on defendant for more than 90% of their requirements for electric power distribution and sale to their retail customers.

Plaintiffs alleged that defendant dominates and controls the distribution and sale of retail electric power within its service area and has acquired four of the twenty municipal electric utilities there since 1957 and unsuccessfully attempted to acquire a fifth. According to plaintiffs,

> "The defendant company now controls the distribution and sale of retail electric power in more than 90% of the communities within its service area, while municipally owned and operated electric systems serve retail customers in fewer than 10%." (Complaint ¶6.)

Plaintiffs have charged defendant with intentionally monopolizing and attempting to monopolize interstate trade and commerce in the distribution and sale of retail electric power, in violation of Section 2 of the Sherman Act (15 U.S.C. §2), by requiring them and other municipalities to pay since January 13, 1973, a new wholesale price which is substantially higher than the retail price it charges its own industrial customers. Because of this "price squeeze," the

municipalities cannot sell electric power to their own industrial customers at prices that compete with defendant's retail prices. One consequence is that defendant may be able to lease Fort Wayne, Indiana's electric utility system for 35 years. Fort Wayne is the largest city within the defendant's service area which still operates its own electric utility. Other alleged consequences of the new wholesale price are:

1. Plaintiffs' ability to compete with defendant for retail and industrial customers has been impaired.

2. In those municipalities that have absorbed the difference between defendant's higher wholesale price and its lower retail industrial prices, pressure has been put on the municipalities to sell or lease their electric utilities to defendant rather than to continue generating operating losses.

3. In those municipalities that increase their industrial retail prices to the level of the defendant's higher wholesale price to them, the disparity between the municipalities' higher retail industrial prices and defendant's lower retail industrial prices threatens to cause the municipalities' industrial customers to exert pressure on the municipalities to sell or lease their electric utilities to defendant so that those customers can purchase electric power at defendant's lower prices.

By a September 30, 1976, amendment to the complaint, plaintiffs alleged that since July 27, 1976, defendant required them and other municipalities to pay a new higher wholesale price for electric power, resulting in their financial inability to buy power at the defendant's new wholesale price and sell it to industrial customers at prices competitive with defendant's retail prices. In its answer to this amendment, defendant admitted that the Federal Power

Commission permitted its higher wholesale rates to become effective on July 27, 1976, subject to refund.[1]

Plaintiffs requested a declaratory judgment that defendant had violated Section 2 of the Sherman Act and an injunction under Section 16 of the Clayton Act (15 U.S.C. §26) against violating it in the future. They also sought an order ending defendant's present rate structure which requires plaintiffs to pay a higher wholesale price to defendant for electric power than the retail prices at which it sells to its own industrial customers. Under Section 4 of the Clayton Act (15 U.S.C. §15), plaintiffs claimed damages in excess of $1 million before trebling. The municipalities also sought attorneys' fees.

Subsequently, on May 1, 1974, defendant filed a motion to dismiss the complaint for lack of subject matter jurisdiction or for failure to state a claim or, in the alternative, to stay the court proceedings until the Federal Power Commission should conclude its regulatory proceedings involving defendant's post-January 13, 1973, rates to wholesale customers. Defendant and the Indiana & Michigan Municipal Distributors' Association (of which plaintiffs are members) were parties to these proceedings before the Commission. On May 1, 1975, Judge Grant denied that motion and at the same time filed an extensive opinion disposing of defendant's arguments (App. 11-29). In the opinion, Judge Grant noted that in March 1972, the Indiana Public Service Commission set defendant's new higher retail rates and that in March 1973, the Michigan Public Service Commission approved an increase in defendant's retail rates. Both of these actions were instituted by defendant's July 30, 1971, petitions for new rates filed with each of the state

1. In June 1975, defendant filed an answer containing three counterclaims against plaintiffs. That pleading need not be summarized herein because it is irrelevant to the issues involved on the interlocutory appeal.

Commissions. In June 1972, defendant submitted proposed increases in the rates charged to its wholesale customers to the Federal Power Commission. The new rates were later made effective on August 13, 1972,[2] but the Commission provided that if it determined that said rates were unjust or unreasonable, it might order defendant to refund the excess to its customers. The Commission began its hearings on the lawfulness of these new wholesale rates on January 31, 1974.

Defendant contended that its retail rates, set by the state utility commissions, were immune from attack under the Sherman Act. The court held that under *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, it did not have authority to intrude upon the Indiana and Michigan Public Service Commissions' approval of defendant's retail rates. However, after distinguishing *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525, and *Pennsylvania Power Company v. Federal Power Commission,* 89 U.S. App. D.C. 235, 193 F.2d 230 (1951), affirmed, 343 U.S. 414, 72 S.Ct. 843, 96 L.Ed. 1042, the Court found that it had jurisdiction over the subject matter of the action, citing *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051; *Keogh v. Chicago & N.W. Ry.,* 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183; and *Otter Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed. 359. In particular, Judge Grant held that

> "Just as the Court in *Otter Tail* was hesitant to conclude that the authority of the Federal Power Com-

2. On August 13, 1972, the Commission suspended the use of these rates until January 13, 1973, the date involved in the original complaint herein. After an appeal to the District of Columbia Circuit by defendant on the grounds that the effective date should be July 14, 1972, the Court proclaimed July 14, 1972, to be the effective date but only allowed defendant to collect the difference between its old and new rates from December 14, 1972, onward. *Indiana & Michigan Electric Co. v. Federal Power Commission,* 163 U.S. App. D.C. 334, 502 F.2d 336 (1974), certiorari denied, 420 U.S. 946, 95 S.Ct. 1326, 43 L.Ed.2d 424.

> mission to order interconnections was intended to 'be a substitute for, or to immunize Otter Tail from, anti-trust regulation for refusing to deal with municipal corporations,' this Court cannot conclude that the Federal Power Commission's authority to review rates was an intended substitute for the anti-trust laws in a situation involving the alleged monopolizing effect of a dual price structture." (mem. op. at 16).

Judge Grant stated that if the Federal Power Commission finally found the defendant's new wholesale rates to be just, the court might be forced to order defendant to initiate a new rate structure, eliminating the dual price system of higher wholesale prices relative to retail prices. On the other hand, if the Commission should find the new wholesale rate to be unjust, he might only enjoin defendant from any future dual system. Consequently the court held that plaintiff had not failed to state a claim upon which relief could be granted.

In conclusion, Judge Grant refused to stay the action until the Federal Power Commission should hand down a final decision because "the lawfulness of the defendant's wholesale rate is not determinative of the issue before" the court (mem. op. 19). The district court ended its opinion as follows:

> "Since it is the initiation of a monopolistic structure that the Court is asked to prohibit and not the rate itself, final action by the agency will not by itself prohibit the problem although it may alleviate it for a time. Furthermore, if the Court found that damages were recoverable in this case and that in determining the damages the final decision of the Commission was necessary and the Commission has not yet ruled on the lawfulness of the wholesale rate the present action could at that time be stayed by the Court for the purpose of awaiting the Commission result." (*Id.*)

Thereafter the case was reassigned to Judge Sharp. On October 22, 1976, he denied defendant's motion to reconsider Judge Grant's order of May 1, 1975. Thereupon, an interlocutory appeal was taken to this Court and allowed pursuant to 28 U.S.C. §1292(b). We affirm.

I. *Exclusive Jurisdiction*

When the district court handed down its opinion refusing to dismiss the complaint and to grant a stay, the Federal Power Commission had ruled that this alleged dual price system and its anti-competitive effects were beyond its jurisdiction (mem. op. 14).[3] However, in *Federal Power Commission v. Conway, Corp.*, 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed.2d 626, the Supreme Court subsequently held that such an anti-competitive price squeeze between jurisdicional wholesale rates and non-jurisdictional retail rates should be considered by the Commission in fixing rates for interstate wholesale sales. Speaking for a unanimous Court, Mr. Justice White said the Commission can take retail rates into consideration in setting the wholesale rate even though they are outside its jurisdiction. 426 U.S. at

3. The Indiana & Michigan Municipal Distributors' Association sought review of the FPC decision to eliminate from the case all testimony, exhibits and consideration of the price squeeze issue. Appealing to the District of Columbia Circuit, IMMDA requested the FPC to confess error in light of *Federal Power Commission v. Conway Corp.*, 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed.2d 626, and obtain a remand to consider the price squeeze issue. On August 13, 1976, the FPC filed such a request. In an initial decision of August 19, 1976, in the wholesale rate case commenced in June 1972, the administrative law judge recommended that the price squeeze issue be resolved in further proceedings. This was in line with the parties' agreement to dispose of the 1972 wholesale rate case by a financial settlement based on the initial decision without resolving the anti-competitive allegations (Pl. Br. 9-10). These facts were brought to the district court's attention before its October 22, 1976, denial of defendant's Motion to Reconsider, Vacate, Set Aside and Amend [the] Court's Order of May 1, 1975 (D. Dr. 5-6). The settlement was approved by the FPC in an order of June 1, 1977.

279-282, 96 S.Ct. 1999. The Court explicitly approved the District of Columbia Circuit's conclusion that

> "When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a price squeeze between themselves. There would, at the very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain retail revenues in order to curb the retail competition of its wholesale customers. 167 U.S. App. D.C. [43] at 53, 510 F.2d [1264] at 1274. (Footnote omitted.)" 426 U.S. at 279, 96 S.Ct. at 2004.

Such a remedy would only operate against the jurisdictional rate.[4]

---

4. A new regulation, 18 C.F.R. §2.17, entitled "Price discrimination and anti-competitive effect (price squeeze issue)," was issued on March 21, 1977, to implement the Commission's mandate under *Conway*. In the order issuing the regulation, provision was made for the state commissions to be kept informed but, of course, no suggestion was made to force them to change the non-jurisdictional retail rates:

> "Both the Federal Power Commission and the NARUC [National Association of Regulatory Utility Commissioners] Board [of Consultants] recognize that state commission participation in rate proceedings before the Commission, particularly in cases involving retail and wholesale rate comparisons, would be desirable, and awareness of the state commission's views on price squeeze issues would be valuable. We, therefore, adopt the NARUC Board's recommendation that in all cases where price squeeze is at issue, the state commission, agency or body which is responsible for regulation of retail rates in the state effected shall be included in the service list maintained by the Secretary under 18 CFR 1.17(c) as if that state commission, agency or body had intervened in the proceeding. In proceedings where the state commission does not take an active part, the NARUC Board recommends that the Commission encourage FPC staff to confer with state commission staff for the purpose of acquiring information particularly within the knowledge of the state commissions in order to gain a more complete picture of the competitive relationship of respective wholesale to retail rates." (D. Rep. Br. App. A8-A9.)

Nothing in the Supreme Court's opinion in *Conway* suggests exclusive jurisdiction, as defendant concedes (D. Br. 32).[5] Indeed, *Conway* suggests that the FPC remedy is limited to setting the jurisdictional rate somewhere above the lower boundary of the zone of reasonableness. A rate set so low that it would fail to recoup fully allocated wholesale costs seems to be beyond the Commission's power. 426 U.S. at 278, 96 S.Ct. 1999. If the retail rates have been set so low by the state utility commissions that a price squeeze could only be fully remedied by setting the wholesale rates below the lower boundary of the zone of reasonable recovery for fully allocated costs, the squeeze would go unremedied to the extent a wholesale rate set at the lower boundary of the zone of reasonableness did not cure the problem. Although *Conway* was brought to the district court's attention, it refused to vacate its order declining to dismiss the complaint and to stay the action.

Subsequent to *Conway*, the Supreme Court decided *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 141, refusing to exempt Detroit Edison's light bulb exchange program from the federal antitrust laws even though it was an approved element of the state rate tariff filed with the Michigan Public Service Commission. Given a complaint that details conduct which, if true, would constitute a substantive antitrust violation, Justice Stevens described two classes of situations involving the interaction of state and federal law where Sherman Act juris-

5. Defendant points to one sentence of dicta in Judge Leventhal's opinion for the D.C. Circuit in *Conway* arguably to the contrary:

> "The FPC's position would leave a regulatory gap—no institution would have authority to consider an undue preference between wholesale and retail rates, even where that preference was deliberately instituted for the purpose of clogging competition, and to reduce interstate wholesale rates." 510 F.2d at 1272.

Judge Leventhal's opinion does not consider antitrust aspects at all. When read in the context of the opinion as a whole, it is clear that the "institution" meant a regulatory administrative body.

diction would, nevertheless, be defeated. First, Congress in passing the Sherman Act may not have intended for the Act to apply, in the first instance, to state action. *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315. Secondly, although originally intended to be covered by the Sherman Act, certain conduct may have been become exempt from the Act.

In a section of his opinion commanding only a four-judge plurality, Justice Stevens concluded that in *Parker* the

> "only Sherman Act issue decided was whether the sovereign State itself, which had been held to be a person within the meaning of §7 of the statute, was also subject to its prohibitions." 428 U.S. at 591.

As in *Cantor,* the plaintiff municipalities have named no state officials or state agencies in the complaint, and there is no claim that any state action violated the antitrust laws. See 428 U.S. at 591-592, 96 S.Ct. 3110. Thus under the plurality opinion, *Parker v. Brown* does not even arguably apply to the facts of our case. Nor do Chief Justice Burger or Justice Blackmun's concurrences in *Cantor* give defendant solace. The challenged activity here is a dual rate structure. The state utility commissions have only put the imprimatur of their sanction on the retail rates charged by the defendant. The price squeeze has not been blessed by Indiana or Michigan. The fact that the district court has no authority to maintain a direct attack on the defendant's retail rates does not alter the reality that the state commissions have in no way placed a badge of approval on the defendant's dual rate structure. Consequently, defendant's conduct is not immunized under *Parker v. Brown.*

Having decided that the Sherman Act applies in the first instance to the conduct at issue here, we must decide whether an exemption nonetheless has been worked. Justice Stevens, in a portion of *Cantor* subscribed to by a

majority of the Court, suggested two geneses for such an exemption. First, it might be unjust to hold a private citizen liable for conduct imposed by the direct command of the sovereign.[6] Secondly, if the sovereign is already regulating an area, Congress may not have intended to superimpose the antitrust laws as an additional and perhaps conflicting regulatory scheme.[7]

In *City of Shakopee v. Northern States Power Co.*, Civ. No. 4-75-591 (D. Minn. 1976), a post-*Cantor* case involving a virtually identical dual rate structure creating a price squeeze between the wholesale and retail sale of electric power, Judge Lord concluded that no exclusive jurisdiction existed in the Federal Power Commission because an exemption from the antitrust laws could not be implied.

6. Although the facts of *Cantor* limited Justice Stevens' consideration to the state sovereign, a finding that conduct arising from the command of the federal sovereign is subject to antitrust liability may be assumed to be similarly unjust.

7. If the sovereign is the federal government, the question reduces to the traditional problem of exclusive jurisdiction. Here the conceptual framework is a federal statute post-dating the Sherman Act lodging the responsibility for regulating the conduct in issue in some federal agency and impliedly repealing the application of the Sherman Act as to this specie of conduct.

If the sovereign is the state government, an implied repealer of a federal law such as the Sherman Act is of course foreclosed by the Supremacy Clause. Presumably, the exemption is created here on the conceptual framework that Congress did not intend the Sherman Act to apply to areas of the economy pervasively regulated by the states. Unlike the *Parker* exclusion, this exemption would not derive from the character of a state's involvement with certain conduct but rather with the quality and scope of the regulatory mechanism imposed by the state over such conduct. The state commissions of Indiana and Michigan are not alleged to have any power to regulate the price squeeze in any sense. Since this conduct is not being regulated by the state commissions, Sherman Act jurisdiction of course is not ousted in favor of state regulation. The defendant does not contend otherwise.

Judge Lord interpreted the first genesis for exemption under *Cantor* to be based on the reasoning that

> "if an anticompetitive practice is the product, at least in part, of the company being regulated and could be avoided if the company chose to do so, then the anticompetitive condition is in reality the work of that company and is not 'necessary' to the functioning of the regulatory scheme and will not be immunized from antitrust liability." (mem. op. 6.)

Accordingly, the court noted that, as here, defendant Northern States Power Co. could have avoided the alleged monopolistic position by "tailoring its applications to allow for competitive 'wholesale' and 'retail' power rates" (mem. op. 7) and that, given such company autonomy, this position was not "necessary" to the functioning of the regulatory scheme.

With respect to implying a repealer of the antitrust acts, Judge Lord began with the now settled axiom that after *Otter Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359, "there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities." *Cantor, supra,* 428 U.S. at 596 n. 35, 96 S.Ct. at 3120. Since the antitrust laws are not generically superseded by the regulation of electric utilities,[8] the only question open to debate is whether the particular application of the antitrust laws is irreconcilably repugnant to the operation of the regulatory scheme. Judge Lord decided that there was "little or no apparent conflict be-

8. In order to imply a general exemption for an economic sector of an industry, mere conflicting standards are not enough. This aspect of a regulatory agency's jurisdiction must be "imperative in the continued effective functioning" of the regulatory scheme over the industry as a whole. *Cantor, supra,* 428 U.S. at 596-597 n. 36 and n. 37, 96 S.Ct. at 320. Since *Cantor* distinguished and refused to apply *Gordon v. New York Stock Exchange,* 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463, perhaps defendant's principal case on this ground, no purpose would be served in discussing it further here. See 428 U.S. at 596-597 n. 36, 96 S.Ct. 3110.

tween applying the antitrust laws to the type of conduct complained of here and the smooth and efficient functioning of the FPC's regulatory system" (mem. op. 5). As in *Shakopee,* the price squeeze alleged in our case

> "is not between rates set by one regulatory agency, as was the case in *Georgia* [*v. Pennsylvania R. Co.,* 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051], but rather is between the 'wholesale' rate set by the FPC and the 'retail' rate over which the FPC has no jurisdiction. Put simply, under these circumstances, antitrust immunity is not 'necessary' to the functioning of the regulatory process because the discrimination is 'external' to that process. The FPC does not control both ends of the discriminatory conduct." (mem. op. 7 n. 6.)

If plaintiff proves it is entitled to relief on the Sherman Act claim asserted in its complaint, the Federal Power Commission's regulatory process would not be disturbed by the court's awarding damages for past anti-competitive conduct or by enjoining future anti-competitive conduct by defendant in making and promoting its rate applications. Thus relief could be granted without the district court's actually becoming involved in the process of setting rates.

Indeed the Federal Power Commission has conceded that it does not have exclusive jurisdiction over conduct such as that alleged here. Following Judge Lord's denial of Northern States Power's motion to dismiss, *Shakopee* is proceeding, we are advised, before the district court and the Federal Power Commission in tandem. On May 23, 1977, the Federal Power Commission released an order in *Northern States Power Company,* FPC Docket No. ER 76-818, stating that the Commission's examination of the alleged price speeze would not affect the district court action in *Shakopee* because

> "That action seeks damages for allegedly anticompetitive activity that occurred in the past. As the District

> Court noted in its October 18, 1976, order denying Northern States' motion to dismiss, should Shakopee prove itself entitled to relief the regulatory process would not be disrupted by an award of damages for past conduct nor by an enjoining of certain future conduct. These remedies are beyond our jurisdiction as we cannot look to past rate schedules and, if a price squeeze were found, we could not take any remedial action. Accordingly there is no alternative to this issue being litigated in both forums, one concerning itself with present rates and the other with past rates and possible future conduct."

This ruling equally applies here. Therefore, it is clear that defendant is wrong in asserting that the Federal Power Commission has exclusive jurisdiction over this matter.

II. *Primary Jurisdiction*

The more difficult question is whether the Federal Power Commission has primary jurisdiction over the price squeeze. Primary jurisdiction is concerned with the proper allocation of responsibilities between the administrative agencies and the courts. "Even when [antitrust actions] and remedies survive and the agency in question lacks the power to confer immunity from [antitrust] liability, it may be appropriate to refer specific issues to an agency for initial determination where that procedure would secure '[u]niformity and consistency in the regulation of business entrusted to a particular agency' or where

> " 'the limited functions of review by the judiciary [would be] more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible

> procedure.' *Far East Conference v. United States,* 342 U.S., [570] at 574-575, [72 S.Ct. 492, 96 L.Ed. 576]." (*Nader v. Allegheny Airlines,* 426 U.S. 290, 303-304, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643).

The defendant argues that since "some facets of the dispute * * * are within the statutory jurisdiction of the [Federal Power] Commission," *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 302, 93 S.Ct. 573, 580, 34 L.Ed. 2d 525—here the *Conway*-dictated duty to set the jurisdictional rate with an eye to any price squeeze between it and the non-jurisdictional rate—the Federal Power Commission must be deemed to preempt anti-trust jurisdiction. However, that position was also foreclosed by *Otter Tail Power Co., supra.* There only the dissenting Justices would have required the antitrust court to defer to the Commission proceeding. 410 U.S. at 392-395, 93 S.Ct. 1022. The other Justices affirmed a decree under Section 2 of the Sherman Act (except in one respect immaterial here) without requiring a stay where there was only a potential conflict between the federal judicial decree and a future order of the Federal Power Commission. 410 U.S. at 376-377, 93 S.Ct. 1022. Any suspicions that the 4-3 vote in *Otter Tail* impairs its authority seem wholly unwarranted in light of the *Cantor* majority's repeated citations of it with approval. See also *Gulf States Utilities Co. v. Federal Power Commission,* 411 U.S. 747, 758, 93 S.Ct. 1870, 36 L.Ed.2d 635.

Even if it cannot be maintained as a matter of course that as between the dual jurisdiction in the district court and in the Federal Power Commission the jurisdiction in the Commission is primary, it may be that deferral to the Commission makes sense as a matter of judicial administration. If a significant inconsistency between the antitrust action and the regulatory scheme which was certain to arise could be specifically shown to be avoidable by letting the Commission proceed first, deferring to the Commission would be advisable. In addition, if the "adjudication of

th[e] dispute by the Commission promises to be of material aid in resolving the [antitrust] immunity question," *Ricci, supra,* 409 U.S. at 302, 93 S.Ct. at 580, or will advance the Court's fact-finding capacity, it may be desirable to hold the antitrust action in abeyance pending the resolution of the proceeding before the commission. Nevertheless, we hold that the Federal Power Commission does not have primary jurisdiction over the price squeeze.

A. *Uniformity*

Where uniformity and consistency of the regulatory scheme are at stake, primary antitrust coverage does not necessarily follow even when there is a statutory grant of express immunity as to certain other conduct approved by a federal agency. *Mt. Hood Stages, Inc. v. Greyhound Corp.,* 555 F.2d 687, 691 (9th Cir. 1977). Where there is no statutory grant of antitrust immunity, so that the argument that Congress intended "conduct not within the exemption [to remain] subject to the antitrust laws" is foreclosed (*id.*), the uniformity interests in primary administrative jurisdiction are correspondingly strengthened. But as Chief Judge Browning added:

> "Conduct is not immunized merely because it falls within the jurisdiction of the regulatory agency, as it did in this case. Immunity is not implied merely because the applicable regulatory standard requires the agency to give weight to antitrust policy, as it did in this instance." (*Id.*)

Indeed, as noted in *Gulf States Utilities Co. v. Federal Power Commission,* 411 U.S. 747, 758-759, 93 S.Ct. 1870, 36 L.Ed.2d 635, the Federal Power Act does not preclude the operation of the antitrust laws even though the Federal Power Commission is required to give weight to antitrust policy. There Justice Blackmun, speaking for six members

of the Court, declared that the Federal Power Commission should consider antitrust and anti-competitive issues before authorizing the issuance of securities under Section 204 of the Act (16 U.S.C. §824c) in order to establish "a first line of defense against those competitive practices that might later be the subject of antitrust proceedings" (411 U.S. at 760, 93 S.Ct. at 1878). This of course does not mean, as defendant urges (Reply Br. 5-6 n.*), that a district court which, as here, has assumed jurisdiction over a price squeeze two years before the Commission agreed to consider it must withhold relief that (as the district court has already indicated) will not interfere with the Commission's rate-making functions. In fact, primary administrative jurisdiction based on uniformity grounds is not even an issue in such a factual setting.

As in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 455, 457, 65 S.Ct. 716, 89 L.Ed. 1051, plaintiffs are seeking to enjoin conduct violative of the Sherman Act and to recover damages therefor. That relief, if appropriate to remedy a proven violation of the antitrust laws, would cause defendant to end its purported current price squeeze practice but need not interfere with rates already approved by the state and federal commissions. The antitrust and regulatory regimes accommodate and supplement each other in order to prove full protection from anti-competitive practices. Here too the remedies afforded under the two statutes can be meshed. As in *Mt. Hood Stages, supra*, 555 F.2d at 692, no plain repugnancy exists between this federal regulatory statute and the Sherman Act as applied to defendant's conduct, nor is it necessary to exempt that conduct from antitrust restraints to make the regulatory statute work. In truth, as recognized as long ago as *Consolidated Gas, Electric Light & Power Co. v. Pennsylvania Water & Power Co.*, 194 F.2d 89, 97-99 (4th Cir. 1952), certiorari denied, 343 U.S. 963, 72 S.Ct. 1056, 96 L.Ed. 1360, Part II of the Federal Power Act, which contains Section 205 involved in this case,

is not repugnant to the antitrust laws and therefore does not supersede them.

In the court below, defendant in effect recognized that the Commission cannot afford the requested relief to plaintiffs because defendant stated it was

> "aware of the Commission's inability to remedy a claim of anti-competitive behavior, premised on the difference in rates charged by [defendant] I & M to its wholesale and retail customers, by raising the retail rates to the level of the wholesale rates" (mem. op. 9).

Nor does *Conway* guarantee that the price squeeze may be fully remedied by severely depressing wholesale rates to eliminate the price squeeze. This is because, as we have demonstrated above, the Federal Power Commission cannot set wholesale rates below the lower boundary of the zone of reasonableness even if the price squeeze could not be eliminated without setting the wholesale price below the zone of reasonableness limit. Primary jurisdiction is not a doctrine that requires an exercise in futility. See *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 686, 85 S.Ct. 1596, 14 L.Ed.2d 640. Thus antitrust relief is needed for full protection from the anti-competitive conduct alleged in the complaint.

If plaintiffs prove their case, instead of interfering with any rates approved by the Federal Power Commission, in addition to possible damages, the district court would presumably order defendant to file a new wholesale rate application that would remove the disparity between the rates charged plaintiffs and defendant's industrial customers. The court would thus not be affording a remedy that would "starkly conflict with the explicit statutory mandate of the Federal Power Commission * * * [or] improperly pre-emp[t] the jurisdiction of the Federal Power Commission * * *." *Otter Tail Power Co., supra*, 410 U.S. at 395, 93 S. Ct. at 1038 (concurring and dissenting opinion of Justice

Stewart). As shown from the opinion below and from the opinion in *Shakopee, supra,* the district court intends to apply the antitrust laws "to the public utility industry only to the extent that the antitrust clams asserted are not within the reach of the regulatory agency's supervision," the very standard recommended by defendant (Br. 21). Under *Otter Tail Power Co., supra,* and *Gulf States Utilities Co., supra,* in fashioning any relief that may be warranted under the Sherman Act, the judiciary must be careful to avoid or resolve any inconsistency with Section 205 of the Federal Power Act. We are confident that the district court will observe this stricture.

Indeed the opinions of the district courts in this case and in *Shakopee* show that they do not intend to interfere with the Federal Power Commission's jurisdiction, because if the Commission should find the respective defendant's higher wholesale rates to be just, the courts would, on proof of violations of Section 2 of the Sherman Act, order the defendants to initiate new rate structures eliminating the dual price system of higher wholesale prices. If the Commission should find the present wholesale rates to be unjust, then the courts would only enjoin the defendants from future dual systems violative of the Sherman Act. Both district courts noted too that it would not disrupt the regulatory process to award damages for any past anti-competitive conduct proved at trial. Therefore, a stay is unnecessary to avoid a clash between the antitrust laws and the Federal Power Act.

B. *Agency Expertise.*

Nor is a stay warranted on the grounds that the Federal Power Commission's expertise will materially advance the district court's fact-finding capacity or aid the district court's determination of the extent of any possible antitrust immunity.

As *amici curiae* "Illinois Municipals."[9] have stated, *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525, has no bearing here because the district court does not need to know the Commission's expert views on what constitutes a just and reasonable rate "as a prerequisite to a determination of whether defendants' activities violate the antitrust laws" (Br. 24). Also, the *Ricci* Court thought the Commodity Exchange Act probably limited the applicability of the antitrust laws there (409 U.S. at 302-304, 93 S.Ct. 573) whereas no such limitation exists here. *Cantor, supra; Otter Tail Power Co., supra.* Under the facts of the instant case, where the district court has first asserted jurisdiction over the antitrust proceedings, it may continue its probe. *California v. Federal Power Commission,* 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54; *Pennsylvania Water & Power Co. v. Consolidated Gas, Electric Light & Power Co.,* 184 F.2d 552, 562-566 (4th Cir. 1950), certiorari denied, 340 U.S. 906, 71 S.Ct. 282, 95 L.Ed. 655.

III. *Discretionary Stay*

Assuming that a discretionary stay could be appropriate even when primary jurisdiction is not in the Federal Power Commission, the district court certainly did not abuse its discretion here. Indeed, the equities weigh heavily in favor of the plaintiff municipalities. The Illinois Municipals point out that the district court should be permitted to proceed in order to avoid the typical lengthy delays that occur in processing wholesale rate increases under Section 205 of the Federal Power Act (16 U.S.C. §824d). Under that provision, a public utility files its rate increase application no less than 30 days before the effective date thereof, and the Commission typically suspends the proposed rate from one day to five months, with refunds required if the rate is found

9. Cities of Batavia, Geneva, Naperville, Rock Falls and St. Charles, Illinois.

to be above the statutory "just and reasonable" standard. The wholesale rate increase in the present case stems from a June 13, 1972, application by defendant, and the case was not terminated in the Commission until it approved a settlement on June 1, 1977, a span of five years. Except for the settlement, the case would still pend before the Commission.

Thus far, the Commission has never rejected a rate filing on price squeeze or other antitrust grounds, and there is no limit on the number of filed increases that may be in effect at the same time under Section 205. Simply by filing an anti-competitive increase and waiting for time to pass, a public utility like defendant can place a price squeeze on wholesale customers. As the Commission has stated, "electric utilities are permitted to file virtually any level of costs and rates and after a period of suspension charge those rates subject to refund, pending Commission decision." FPC Order No. 487, 50 FPC at 127 (1973).

Under this procedure, the price squeeze can continue between the time the Commission allows the rates to go into effect and its final order, for the new *Conway* remedy as to price squeezes does not become effective until then. Thus, if a stay were granted to defendant, plaintiffs and customers in similar positions would be unable to secure any relief from price squeezes like this until the Commission finally approved the filed rates. As the Illinois Municipals have picturesquely put it:

> "Delay, combined with the multiple rate increases, could mean that the customer has been put out of business by his supplier-competitor. You cannot give refunds to a corpse." (Br. 27-28.)

Furthermore, the Commission would be unable to afford complete relief because the Federal Power Act does not provide for damages or for an injunction against a utility

violating the antitrust laws. Thus a stay in this case would excuse defendant's alleged non-compliance with the antitrust laws for a completely unnecessary length of time.

IV. *Disposition*

At oral argument, we were advised that on January 14, 1977, defendant requested the Federal Power Commission to approve a negotiated settlement between it, these plaintiffs and others for the period from January 13, 1973, to July 27, 1976, when defendant's new wholesale rate schedule became effective. This settlement was approved on June 1, 1977. See note 3 *supra*. Upon remand, the district court will have to determine whether this settlement agreement has mooted any of the antitrust claims in this case. Of course, the claims stemming from the July 27, 1976, higher wholesale prices are still active.

While we are holding that the district court need not stay further proceedings herein, we agree with Judge Grant that if the district court should ever find it necessary to ascertain particular Commission action in order to decide the exact scope of antitrust damages, or for other purposes, the court may then stay its hand for the purpose of awaiting the Commission result (mem. op. 19).

The orders of May 1, 1975, and October 22, 1976, are affirmed.

Order and Memorandum of the District Court (May 1, 1975)

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

Civil Action No. S 74-72

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal Corporations,

Plaintiffs,

v.

INDIANA & MICHIGAN ELECTRIC COMPANY,
a Corporation,

Defendant.

ORDER

The defendant, Indiana & Michigan Electric Company, filed a motion to dismiss the above entitled action pursuant

to Rule 12, F.R.C.P., or, in the alternative, that the proceeding be stayed in the event that defendant's motion to dismiss be denied.

The defendant seeks to dismiss on the grounds that this Court lacks jurisdiction over the subject matter of this action and that the complaint fails to state a claim upon which relief may be granted.

The defendant has also filed a motion for leave to file a supplementary affidavit in support of its motion to dismiss or in the alternative to stay, which motion is DENIED for the reasons stated in the following Memorandum.

After reviewing defendant's motion, the parties' briefs, and oral argument having been held,

IT IS THE ORDER OF THE COURT that defendant's motion to dismiss or in the alternative to stay be, and the same is, hereby DENIED.

ROBERT A. GRANT

District Judge

ENTER: May 1, 1975

MEMORANDUM

The plaintiffs, City of Mishawaka, Indiana; City of Niles, Michigan; Cities of Columbia City, Bluffton, Garrett, and Gas City, Indiana; and the Towns of Frankton, Warren, New Carlisle, and Avilla, Indiana, filed the present action on March 25, 1975, against Indiana & Michigan Electric Company (hereinafter I & M). Plaintiffs have based jurisdiction of this action on Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, and allege that the defendant, I & M, has monopolized and attempted to monopolize interstate trade and commerce in the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

Order and Memorandum of the District Court
(May 1, 1975)

Plaintiffs in their complaint state that they are municipalities which operate their own electric distribution systems; that they are within the service area of the defendant, I &M; and that they sell and distribute the electric power at retail to industrial, commercial, and residential customers within their corporate limits and in nearby areas.

Plaintiffs describe I & M as a vertically integrated electric power company which generates electric power, transmits the power throughout its service area, and delivers the power to its wholesale customers, including the plaintiffs, and also directly to its retail customers.

Plaintiffs allege that the defendant company is the only firm within their service area engaged in the business of transmitting and selling electric power at wholesale and, thus, the only outside source of supply for wholesale electric power available to them. The complaint states that plaintiffs, Mishawaka, Indiana; Columbia City, Indiana; Garrett, Indiana; Gas City, Indiana; Frankton, Indiana; Warren, Indiana; New Carlisle, Indiana; and Avilla, Indiana, depend on the defendant for all of their requirements of wholesale electric power. Plaintiffs Niles, Michigan, and Bluffton, Indiana, which operate generating facilities, allege that they depend on the defendant for more than 90% of their requirements of electric power.

The plaintiffs further contend that the defendant dominates and controls the distribution and sale of retail electric power within its service area. They contend that the defendant has increased its control of the retail market by acquiring municipal electric utilities. It is stated in their complaint that since 1957 the defendant has purchased the assets of four of the twenty (20) municipal utilities within its service area, has absorbed their retail distribution into the I & M system, and has taken over their retail industrial, commercial and residential customers, as follows: Kendallville, Indiana (1957), Decatur, Indiana (1959), Portland,

Indiana (1963), and Albion, Indiana (1966). Because of this, the plaintiffs contend that the defendant company now controls the distribution and sale of retail electric power in more than 90% of the communities within its service area, while municipally owned and operated systems serve retail customers in fewer than 10%.

Plaintiffs allege that the defendant, I & M has monopolized and attempted to monopolize interstate trade and commerce in the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2, in the following ways:

(1) Since January 13, 1973, the defendant has required municipalities to pay a new wholesale price for electric power. The new wholesale price is substantially higher than the retail price the defendant company charges its own industrial customers. This causes the municipalities to be unable to buy power at the defendant's wholesale price and sell it at competitive prices.

(2) On March 8, 1974, after fourteen months of requiring the city of Fort Wayne to pay more for wholesale electric power than the defendant's own retail industrial customers pay, and after more than twenty (20) years of selling retail electric power to its own customers in the Fort Wayne area for less than it sells retail power elsewhere, the defendant obtained the agreement of the city officials that the city of Fort Wayne will lease its entire electric utility system to the defendant for thirty-five (35) years. Under the lease agreement to be submitted to the voters, I & M will take possession of all the property and facilities of the city's electric utility and will operate the electric distribution system. The defendant will take over the city's retail customers and will sell electric power directly to them.

The plaintiffs further contend that the adoption of a wholesale price to municipalities in excess of the retail

prices at which it sells electric power has caused and threatens to cause the following consequences:

(1) It impairs the plaintiffs' ability to compete against the defendant.

(2) In municipalities that have absorbed the difference between the defendant's higher wholesale price and lower retail price, the electric utility's loss of earning exerts pressure on the citizens and officials of the municipality to discontinue operating the utility and to offer to sell or lease it to the defendant.

(3) In the municipalities that increase their own industrial retail prices to the level of the defendant's higher wholesale price, and above the level of the defendant's lower retail industrial prices, this situation threatens to cause the municipalities' industrial customers to exert pressure on the municipalities to sell or lease its utility to the defendant so they can purchase electric power at the defendant's lower price.

It is the plaintiffs' contention that these alleged practices have been done with the intent, and have the effect, of monopolizing part of the trade and commerce among the several states in the distribution and sale of electric power at retail in violation of Section 2 of the Sherman Act and have injured the municipalities in their business and property. Plaintiffs thus seek declaratory and injunctive relief and treble damages.

The defendant, I & M, has responded to plaintiffs' complaint by filing a motion to dismiss or in the alternative to stay, pursuant to Rule 12 of the F.R.C.P. The defendant's motion to dismiss is based upon the following grounds: The Court lacks jurisdiction over the subject matter of the action and the plaintiffs' complaint fails to state a claim upon which relief may be granted.

Order and Memorandum of the District Court
(May 1, 1975)

In the motion to stay, defendant contends that in the event the Court does not dismiss this action, the Court should order this proceeding stayed until the conclusion of the regulatory proceedings before the Federal Power Commission involving defendant's rates charges to wholesale customers, including plaintiffs, to which proceedings defendant and the Indiana & Michigan Distributors Association (of which plaintiffs are members) are parties.

Subsequent to a hearing on defendant's motion to dismiss, or in the alternative to stay, and while defendant's motion was under advisement by the Court, the defendant filed a motion for leave to file supplementary affidavit and exhibits in support of its motion to dismiss or in the alternative to stay. The Court finds from reviewing defendant's supplementary affidavit and exhibits that they are submitted in support of the proposition that the dual pricing structure of which plaintiffs complain does not exist and that plaintiffs are in fact paying less under the present wholesale rates than they would pay under the applicable retail tariff and, therefore, there is no basis upon which the plaintiffs can claim injury. The Court finds that the material which defendant seeks to file, by way of supplementary affidavit and exhibits, is not material in support of its motion to dismiss or in the alternative to stay but, in fact, is material in opposition to the substantive issue of plaintiffs complaint, which issue is presently not before this Court. The present motion before the Court and the motion defendant seeks to supplement, involves the jurisdiction of this Court and not the merits of plaintiffs' complaint. If and when the merits of plaintiffs' complaint are at issue, the defendant will be allowed to present its opposition to plaintiffs' claim and the Court will then consider such material. The Court finding defendant's supplementary material to be irrelevant to the present motion, it is the Order of the Court that defendant's motion for leave to file supplementary affidavit and exhibits be denied.

Order and Memorandum of the District Court
(May 1, 1975)

In considering defendant's motion to dismiss or in the alternative to stay, the Court has had to become familiar with some of the proceedings that have gone on and are going on in the Public Service Commissions of Indiana and Michigan ("Indiana Commission" and "Michigan Commission", respectively), and the Federal Power Commission ("Commission") with respect to the approval of retail and wholesale rates submitted by I & M since 1971. The following is a summary of what has occurred in the respective Commissions:

RETAIL RATES

Dates	*Action Taken*
July 30, 1971	I & M filed petition requesting the Indiana Commission to make an investigation and hold public hearings in regard to I & M's proposed new rates.
March 24, 1972	Indiana Commission issued an order setting I & M's retail rates for the State of Indiana. The rates were effective March 29, 1972.
July 30, 1971	I & M filed a petition with the Michigan Commission asking them to investigate and hold hearings on the proposed rate increase for Michigan.
March 20, 1973	The Michigan Commission granted an increase in the rates. The rates were effective March, 1973.

Order and Memorandum of the District Court
(May 1, 1975)

WHOLESALE RATES

Dates	*Action Taken*
June 13, 1972	Pursuant to 16 U.S.C. §824(d), I & M submitted proposed rate increases in the rates charged to wholesale customers to the Federal Power Commission.
August 11, 1972	Public hearings were ordered and the Indiana and Michigan Municipal Distributors Association (IMMDA) request to intervene in the proceeding was granted.
August 13, 1972	The Commission designated this date as the effective date for I & M's new rates and suspended the effective date of the new rates for five months thereafter, until January 13, 1973.
December 5, 1972	I & M appealed to the United States Court of Appeals in the District of Columbia Circuit, on the grounds that the effective rate date should be July 14, 1972. While it was *sub judice,* the Commission on January 31, 1974, commenced its hearings on the lawfulness of the proposed rates.

Order and Memorandum of the District Court
(May 1, 1975)

Dates	*Action Taken*
February 14, 1973	The Court of Appeals ruled favorably on I & M's petition, vacated the Commission's suspension order and remanded the proceeding to the Commission, with instructions that I & M's rates be made effective retroactive to July 14, 1972. A petition for rehearing was filed.
August 14, 1974	The rehearing was granted and the Court modified its order as follows: I & M may not collect retroactive rate increases for the five-month period from the effective date of its rate filing, July 14, 1972, through December 13, 1972; I & M may collect the difference between its old and new rates for the period from December 14, 1972, through January 13, 1973. If the Commission determines that I & M's filed rates are unjust or unreasonable, it may order I & M to refund the amounts collected after December 13, 1972, in excess of the just and reasonable rates. *Indiana & Michigan Electric Company* v. *Federal Power Commission,* No. 72-2168 (D.C.Cir. 1974).
April 16, 1974	The hearings on the lawfulness of I & M's rates were concluded and a briefing schedule established, final briefs being due on September 3, 1974. It is expected that the final decision of the Administrative Law Judge will be appealed.

Order and Memorandum of the District Court
(May 1, 1975)

I—*Subject Matter Jurisdiction*

Defendant I & M contends that its retail rates which have been set by the Indiana Commission and the Michigan Commission are immune from attack under the Sherman Act. It argues that it is a well settled principle of antitrust law that conduct which violates the Sherman Act, if undertaken by a private individual, is immune from attack under the Sherman Act if undertaken by the state or its agents acting in the scope of their authority, *Parker* v. *Brown,* 317 U.S. 341 (1943). I & M alleges that nothing in the Sherman Act is intended to restrain a state or its officers or agents from activities directed by its legislature. It is defendant's position that congress has pre-empted the authority over wholesale rates of electric utilities but has left the states sovereign with respect to the rates and regulations concerning retail sales within the states' borders. Therefore, the retail rates in Indiana and Michigan are subject exclusively to regulation by the Indiana and Michigan Commissions. Defendant states that because I & M's retail rates derive their authority and efficacy from the legislative commands of Indiana and Michigan and cannot operate or be effective without that command, they are immune from attack under the Sherman Act.

It is also the defendant's position that the Court cannot issue an order affecting the wholesale rates since they are within the exclusive or, alternatively, the primary jurisdiction of the Commission. Defendant contends that should the present proceedings not be terminated, they will result in an order determining the just and reasonable rates for I & M's wholesale customers, including the plaintiffs herein, and these wholesale rates will be subject to the Commission's approval as just and reasonable. I & M assert that the rates which plaintiffs attack are clearly within the Commission's regulatory domain. The defendant also acknowl-

edges that anti-competitive conduct may be raised and considered by the Commission in its rate determination, but it may only deal with allegations of anti-competitive conduct that are specifically articulated and that are within its jurisdiction to remedy. I & M further agrees that the Commission has no power over the retail rates which are left to the regulatory power of the State Commissions. Because the Commission has no power over the retail rates, I & M is aware of the Commission's inability to remedy a claim of anti-competitive behavior, premised on the difference in rates charged by I & M to its wholesale and retail customers, by raising the retail rates to the level of the wholesale rates. The Commission also finds that its jurisdiction over wholesale rates is clear and that it cannot be limited by the state's action with respect to retail rates. It is the defendant's contention that the Commission cannot set wholesale rates at a level equal to or lower than the retail rates if the lower rate would not be adequate to cover the utilities' allocated cost-of-service or would result in an inadequate rate of return. To do so would result in an abdication of the Commission's statutory responsibility to set only just and reasonable rates.

The defendant sees the problem as one of inter-relationship of two separate statutory schemes. The Sherman Act has as its goal the determination of prices and services by the working of a free market. The Federal Power Act substitutes for competition the authority of a regulatory agency to supervise the rates and prices charged by electric companies on the grounds that the concept of prices set by free market competition has no place in industries which are monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business. Thus the defendant contends that the antitrust laws may only be applied to the extent that the matter in

question is not within the reach of the regulatory agency's supervision.

The plaintiffs in response to defendant's argument contend that the Court does have jurisdiction of the subject matter of this case. It is plaintiffs' position that the use of monopoly power to prevent competition is a violation of the anti-trust laws over which this Court has jurisdiction. They rely on Section 2 of the Sherman Act, 15 U.S.C. §2. They further assert that Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, provide a right of action and remedies to private parties who are injured by violation of the Sherman Act.

The plaintiffs contend that the defendant's motion ignores the fact that this anti-trust action does not challenge the defendant's wholesale or retail prices, but challenges the defendant's act of allegedly monopolizing and attempting to monopolize the business of selling electric power at retail. Plaintiffs contend it does so by abusing its discretion to file wholesale and retail prices and by instituting a dual price structure that prevents competition and extends the monopoly control.

It is the plaintiffs' position that this Court will not be required either to issue an order raising the retail rates, or issue an order lowering the wholesale rates. Plaintiffs assert that the power to establish prices rests with the defendant utility, subject only to the requirement that it be within a zone of reasonableness and that they undergo agency review. It is the plaintiffs' position that the defendant itself has the power to eliminate the dual price system by changing its own price-setting practices and by making such new filings before one or more of the state or federal regulatory agencies as the defendant sees fit which will remove the allegedly unlawful disparity between the price at which the defendant sells electric power to its customers and the price the defendant requires its competitors to pay.

Order and Memorandum of the District Court
(May 1, 1975)

Plaintiffs claim that the Federal Power Act does not immunize the defendant's alleged monopoly from coverage of the anti-trust laws, and that the defendant itself concedes in its brief on Page 25 that the anti-trust laws may be applied "to the extent that the matter in question is not within the reach of the regulatory agency's supervision." It is argued by the plaintiffs that the Federal Power Act, as interpreted by the Commission, does not itself provide a pervasive regulatory scheme to control the defendant's practice of instituting a dual price system and requiring its competitors to pay more for electric power than its retail customers. Plaintiffs state that the Commission has held that dual price systems and their anti-competitive effects are beyond the Commission's jurisdiction. Thus, the Federal Power Act fails to replace the anti-trust laws with provisions that would regulate the defendant's monopolization or immunize the defendant from the coverage of the anti-trust laws.

After reviewing both parties' arguments as to whether the Court lacks jurisdiction over the subject matter of this action, the Court finds that it does have jurisdiction over the case before it. The defendant has attempted to send the Court down two paths of exclusive jurisdiction and then inform it that because the Court has no control over the exclusive areas, it has no jurisdiction over the present action. I & M first argues that the retail rates in dispute are the products of approval by the Indiana and Michigan Public Service Commissions and, as such, are protected from the Sherman Act under the reasoning set out in *Parker* v. *Brown, supra.* Next, I & M points out how the Federal Power Act, 16 U.S.C. §824(d)(a) 1970 has granted the Commission the power to decide if the rates and charges made, demanded, or received by a public utility for or in connection with the sale at wholesale of electric energy are just and reasonable and therefore lawful. The Court agrees

with the defendant and the principles set forth in *Parker* v. *Brown*. The Court in this case does not have any authority under the Sherman Act to attack the Indiana and Michigan Public Service Commissions' findings that the retail rates implemented by I & M were lawful. The respective state commissions are empowered to determine whether the electric retailers' rates are just and reasonable in relation to cost and rate of return, and the Court in no way intends to intrude upon that particular decision. Further, the Court recognizes that Congress has pre-empted the authority over wholesale rates. There is no dispute but that the Federal Power Commission has been given the task of reviewing the lawfulness of the wholesale rates charged by the defendant company. However, the plaintiffs themselves are not attacking the action of the state commissions, nor the role of the Federal Power Commission. What is really at issue in this case is the action of the defendant, I & M.

I & M deals in both wholesale and retail electric power and, therefore, has to initiate rates which are subject to the scrutiny of the state commissions on one level and the Federal Commission when wholesale rates are put into effect. The Commissions operate independently of one another and in no way rely on the other's actions when deciding upon the lawfulness of the respective rates. The defendant in this case is also the plaintiffs' only outside source of wholesale electric power, which position makes the Federal Power Commission the only control over the defendant's price for wholesale power since competition with other wholesalers does not exist in the area.

A great portion of the defendant's argument focused on a regulatory agency's exclusive or primary jurisdiction over the rates charged by the defendant. I & M cites the cases of *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), and *Pennsylvania Power Company* v. *F.P.C.*, 193

F.2d 230 (D.C.Cir. 1951), *aff'd.*, 343 U.S. 414 (1952), to support the position that anti-trust laws have no application upon an issue which has been placed under the control of a regulatory agency. Here the defendant contends that Congress has given the power over wholesale rates to the Commission and that anti-trust criteria are not to be the governing factor. In both *Ricci* and *Pennsylvania Power Company* the Court was concerned with conduct covered by the respective regulatory statutes. In *Ricci* the issue before the Court involved whether the defendant had violated the rules of the Chicago Mercantile Exchange, an issue the Supreme Court decided was within the jurisdiction of the Commodities Exchange Commission. In *Pennsylvania Power Company* the Court would not allow anti-trust criteria to be forced upon the Commission in its decision of what rate was just and reasonable.

The case before us is distinct from both *Ricci* and *Pennsylvania Power Company*. Here, the alleged monopolistic practice not only involves rates which are subject to review by the Federal Power Commission but also separate rates reviewed by state commissions. Further, it is not the decision by the commission, nor the criteria used in the commission's decision, that is under attack by the plaintiffs. Instead, what is sought to be enjoined is beyond the reach of both state and federal commissions and within the power of the defendant; that is, the initiation of a dual rate structure whereby plaintiffs are allegedly being forced out of the retail electric business by the defendant.

The Federal Power Commission itself has indicated that the alleged dual price system and its anti-competitive effects are beyond the Commission's jurisdiction (Order Denying Motion to Reject, Granting Petition to Intervene in Part and Amending Prior Order, Indiana and Michigan Electric Co., FPC Docket No. 7740, November 27, 1973 [Appendix A] Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss or Stay).

Order and Memorandum of the District Court
(May 1, 1975)

The dilemma caused by the seemingly contrary purposes of the regulatory agencies and the anti-trust laws is not a new issue in anti-trust litigation. Although they are different forms of control, they have the same goal and that goal is to serve the public interest. In the Supreme Court case of *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1944), the State of Georgia, as plaintiff, filed suit against twenty railroad companies alleging that the companies conspired to fix their rates in such a manner as to prefer the ports of other states over the ports of Georgia in violation of the anti-trust laws. The Court in *Georgia* stated that "[r]egulated industries are not *per se* exempt from the Sherman Act."

The Court in the Georgia case also cited Justice Brandeis' words in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922) wherein he stated as follows:

> All the rates fixed were reasonable and nondiscriminatory. That was settled by the proceeding before the Commission . . . . But under the Antitrust Act, a combination of carriers to fix reasonable and nondiscriminatory rates may be illegal; and if so, the Government may have redress.

The Court further stated:

> The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government . . . The type of regulation which Congress chose did not eliminate the emphasis on competition and individual freedom of action in rate making . . . . The Act was designed to preserve private initiative in rate-making as indicated by the duty of each common carrier to initiate its own rates.

Although the *Georgia* case involved the Interstate Commerce Commission and not the Federal Power Commission,

it has many similarities with the present case. Here, as in *Georgia,* the rates are not within the discretion of the Court. It is also a fact that in the present case, the Federal Power Commission has no power over the alleged anti-trust violation that is asserted here because it involves retail rates over which it has no control. 16 U.S.C. §824.

Because the alleged dual structure is outside the jurisdiction of both the federal and state commissions, there is actually no conflict between the anti-trust laws and the regulatory agency. *Georgia, supra.* The defendant has attempted to present the plaintiffs' claim as one attacking the rates themselves and not one attacking their effect.

The Court in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1972), faced a similar defense and stated as follows:

> The anti-trust charge against Otter Tail does not involve the lawfulness of its retail outlets, but only its methods of preventing the towns served from establishing their own municipal systems when Otter Tail's franchise expired.

The Supreme Court in *Otter Tail* further stated the following with respect to the Federal Power Act, 16 U.S.C. §824:

> There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.

Just as the Court in *Otter Tail* was hesitant to conclude that the authority of the Federal Power Commission to

order inter-connections was intended to "be a substitute for, or to immunize Otter Tail from, anti-trust regulation for refusing to deal with municipal corporations", this Court cannot conclude that the Federal Power Commission's authority to review rates was an intended substitute for the anti-trust laws in a situation involving the alleged monopolizing effect of a dual price structure.

Because regulated industries are not immune from anti-trust laws and because the present case concerns an issue over which the regulatory agency has no jurisdiction, the Court finds that it has jurisdiction over the subject matter of this action, and the defendant's motion to dismiss for lack of jurisdiction is denied.

II—*Failure to State a Claim*

The defendant also argues that the plaintiffs' complaint should be dismissed for failure to state a claim upon which relief may be granted because their claim is premature and because if defendant's wholesale rates have been too high, plaintiffs will not be injured because of a possible refund. I & M contends that plaintiffs' claim assumes the existence of two established rates, one for I & M's retail industrial customers and one for the plaintiff municipalities, and that, in fact, there is only one established rate, that being the retail rate. It cites the Untied States Court of Appeals for the District of Columbia Circuit on rehearing in *Indiana & Michigan Electric Co.* v. *FPC,* Docket No. 72-2168 (D.C. Cir. Aug. 14, 1972), in which the Court altered the effective date of I & M's proposed wholesale rates for electric power and permitted the rates to become effective subject to refund based upon the Commission's decision. It is the defendant's position that although I & M may collect the difference between its old and new rates from December 14, 1972, the rate has not yet been approved by the Commission and thus is subject to being reduced by the Commission.

Order and Memorandum of the District Court
(May 1, 1975)

The facts of this case show that the state commissions have established retail rates and that there is presently pending before the Federal Power Commission the issue of the lawfulness of I & M's wholesale rates. The Court notes that although the question of the rates' lawfulness has not been resolved by the Commission, the rates themselves are in effect and have been for collection purposes since December 14, 1972. It is true that if the Commission finds the rates to be unlawful, the defendant will have to refund that portion of the rate found to be excessive. On the other hand, if the rates are just in relation to cost and fair rate of return, they will no doubt be upheld by the Commission. In either situation, we are discussing a future result which is in no way based on any of the anti-trust considerations set forth in plaintiffs' complaint.

The Court finds that there are presently in effect two rates: one an established rate for retail electric power, and one a rate for wholesale power, the latter being subject to change by the Commission although it is presently being collected. It would be notably different in this case if the practice of the Commission was to not allow a rate increase to go into effect until after approval by the Commission. For if that were the situation, the plaintiffs would be complaining about a future harm that might never come to pass. Whether the rate presently being charged by the defendant as wholesaler will be upheld by the Commission is not the ultimate concern of the plaintiffs in this case. The real concern here is the defendant's present and future ability to set up a dual price structure by going through two reviewing commissions which have no control over the dual structure.

The fact that the defendant has legally set both its wholesale and retail prices is no ground to immunize it from the anti-trust laws. *Georgia, supra.* The Court finds that although the present wholesale rate is subject to change by the Commission, the Commission has no power

over the alleged dual rate structure which is allegedly in effect at this time. Thus, it has no jurisdiction over the issue in this suit. The plaintiffs are not attacking the actual rates charged by the defendant and, therefore, whether the Commission finds the rate fair is irrelevant to the substantive issue before the Court. The defendant has the right to initiate a given rate, and the Commission has the authority to make sure the rate is fair in relation to cost and rate of return. The initiation of new rate schedules is a continuing process carried on by the defendant. It is also the point over which this Court has the power to provide relief if the plaintiffs can prove their allegation. Because the Court is in reality focusing on the dual price structure and not the actual prices charged for either retail or wholesale, the results of the Commission's decision would only affect whether defendant would have to initiate new rates if the plaintiffs can prove that defendant is violating the Sherman Act, §2. That is, if the Commission finds the defendant's rates to be just, the Court would be forced to order defendant to initiate a new rate structure which eliminated the dual price system of higher wholesale prices. However, if the Commission finds the present rate to be unjust, then the Court would only enjoin the defendant from any future dual system.

The defendant also contends that if the Commission declares the present wholesale rates to be unlawful, the defendant will have to refund the excessive amount and, therefore, there will have been no damage. Whether the plaintiffs are entitled to damages, although not clear at this point, is no reason to deny the Court jurisdiction over this action which seeks injunctive, declaratory and damage relief. If, in fact, the plaintiffs can recover damages in this action, the amount of those damages will have to be proved by the plaintiffs at trial. It is, therefore, the Order of the Court that defendant's motion to dismiss for failure to state a claim be denied.

Order and Memorandum of the District Court
(May 1, 1975)

III—*Stay the Proceeding*

The defendant also asks that if the Court does find that it has jurisdiction over the present action, the action be stayed until a final decision is handed down by the Commission. As stated above, the Commission's decision on the lawfulness of the defendant's wholesale rate is not determinative of the issue before this Court. The issue of the lawfulness of the defendant's rate is in the exclusive jurisdiction of the Commission and is not for this Court to decide. If that were the issue before the Court, the case would have to be dismissed.

Staying the present action will not aid this Court in deciding the matter before it as it did the Court in *Ricci*. In this action the alleged wrong is occurring at this time, and although there is a possibility that agency action may change the situation, the same possibility exists that no change will take place. The agency acts as a review agency after the rate is initiated by the utility company. Since it is the initiation of a monopolistic structure that the Court is asked to prohibit and not the rate itself, final action by the agency will not by itself prohibit the problem although it may alleviate it for a time. Furthermore, if the Court found that damages were recoverable in this case and that in determining the damages the final decision of the Commission was necessary and the Commission has not yet ruled on the lawfulness of the wholesale rate the present action could at that time be stayed by the Court for the purpose of awaiting the Commission result.

It is, therefore, the Order of the Court that defendant's motion to stay be denied.

Order of the District Court, October 22, 1976

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

Case No. S74-72
Date 10/22/76
Time—From: 1:30
To: 2:30
Deputy R. Timmons
Reporter—Gail
Judge—Allen Sharp

CITY OF MISHAWAKA, INDIANA *et al.*

vs.

INDIANA & MICHIGAN ELECTRIC COMPANY

Plaintiff(s) Represented By Thomas R. Ewald and R. Wyatt Mick Jr.

Defendant(s) Represented By Peter J. Schlesinger and Lawrence Levy

Proceedings:

Hearing had on pending motions. Court hears argument of counsel. Defendant, Indiana & Michigan Electric Company's motion to reconsider, vacate, set aside and amend this Court's Order of May 1, 1975, is overruled. On verbal motion of counsel, Defendant is granted leave to file an appeal from this Order, pursuant to Title 28 USC, Section 1292(b). Court reserves its ruling on Pltfs.' motions to dismiss Deft's. counterclaims and to strike parts of Deft's. answer. Deft. is given to November 8, 1976, within which to answer the amendment to the Complaint. SHARP, J.

Stipulation of Facts

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Consolidated Civil Action Numbers
S 74-72, S 75-210 and S 77-0209

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal corporations,

Plaintiffs,

v.

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION,
and INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Defendants.

It is hereby stipulated by and between the parties to these actions that, solely for purposes of these actions, there

is no dispute as to the facts set forth in this stipulation. It is the parties' intention not to be bound by this Stipulation of Facts in any action other than the above-captioned actions. The parties reserve the right to (1) object to the admissibility of any facts on the ground of relevance or materiality, (2) introduce additional evidence at trial, and (3) correct or amend this stipulation by agreement of the parties subsequent to its execution and prior to the close of trial.

1. Each of the plaintiffs in these Consolidated Actions is a municipal corporation.

2. Each plaintiff is and has been at least since the institution of S 74-72 a member of the Indiana & Michigan Municipal Distributors Association, and of the Indiana Municipal Electric Association. Plaintiffs Gas City, Mishawaka, Niles and New Carlisle are also members of the American Public Power Association.

3. Each plaintiff, pursuant to state statutory authority, operates its own electric utility through which it purchases bulk power and energy at wholesale from Indiana & Michigan Electric Company and sells and distributes the electric power and energy at retail to customers within its corporate limits and in nearby areas.

4. Indiana & Michigan Electric Company ("I&M") is a corporation organized and existing under the laws of the State of Indiana, and is an operating electric company subsidiary of American Electric Power Company, Inc. which generates and transmits electric power and energy and sells electric power and energy at wholesale to plaintiffs and others and which distributes and sells electric power and energy at retail to industrial, commercial and residential

customers within a geographic area of approximately 7,740 square miles in the states of Indiana and Michigan.

5. Defendant American Electric Power Company, Inc. ("AEP") is an investor-owner public utility holding company, under the Public Utility Holding Company Act of 1935, which owns 100% of the common stock of American Electric Power Service Corporation and of seven electric company subsidiaries, some of which generate, transmit and distribute electric power and energy in the states of Indiana, Michigan, Ohio, Kentucky, Tennessee, Virginia and West Virginia, one of which is I&M.

6. Defendant American Electric Power Service Corporation ("Service Corporation") is a New York corporation which provides management, professional and technical services, including planning, engineering, design, construction supervision, financing, accounting and other legal services, among other services to, among others, the seven electric company subsidiaries referred to above. Service Corp. participates in I&M's rate filings or proceedings before state or federal regulatory commissions, but does so only on I&M's behalf and as its agent.

7. Plaintiffs Mishawaka, Columbia City, Garrett, Gas City, Frankton, Warren, New Carlisle and Avilla, Indiana purchase 100% of their electric power requirements at wholesale from I&M.

8. Plaintiffs contend, and defendants do not contest, that plaintiffs Bluffton, Indiana and Niles, Michigan purchase approximately 95% of their electric power requirements at wholesale from I&M.

9. All plaintiffs are located within the area served by I&M.

10. An electric tariff is a rate schedule which, for purposes of this litigation, may be said to reflect three components of a bill for electric power and energy: a demand charge (reflecting capital investment allocable to each customer of the class); an energy charge (incremental charges for energy actually consumed during the billing period and consisting, in the main, of the cost of fuel prevailing during the historical or prospective test year utilized in the cost of service study); and a fuel adjustment clause (providing for billing adjustments in accordance with fluctuations in the cost of fuel). A rate tariff may also contain a demand "ratchet" which provides that the minimum monthly bill shall in no event be less than a specified percentage of the greater of either the customer's contract capacity or the customer's highest previously established monthly billing demand during the term of the contract.

11. As a matter of terminology, electric "power" relates to service under the demand clause of the rate tariff, and electric "energy" relates to service under the energy charge on an electric bill.

12. The rates charged by I&M are subject to regulation by three separate jurisdictions. I&M's wholesale for resale rates to, among others, its wholesale for resale customers, including all of the ten plaintiff municipal wholesale customers, are subject to the regulation of the Federal Energy Regulatory Commission (formerly Federal Power Commission, and both of which are herein interchangeably referred to as the "Federal Commission"). I&M's retail rates to its customers in the State of Indiana are subject to the regulation of the Public Service Commission of Indiana (the "Indiana Commission"). I&M's retail rates to its customers in the State of Michigan are subject to the regulation of the Michigan Public Service Commission (the "Michigan Commission").

13. Pursuant to the regulations of the commissions regulating all three of I&M's jurisdictional rates, no adjustment may be made in I&M's rates without the filing by I&M of a petition therefor, except for certain charges under an automatic fuel adjustment clause.

14. Pursuant to the regulations of the Federal Commission, I&M's filings for changes in its wholesale rates are required to be accompanied by, among other things, (a) a study projecting I&M's cost of service in a prospective test year, (b) expert testimony supporting a specific rate of return on such cost of service to each class of customer, and (c) a set of tariffs designed to yield the revenues claimed to be equal to the said cost of service and the said claimed rate of return.

15. While rate filings with the Indiana Commission are inaugurated by a petition containing no specification of the rate increase sought, I&M does file cost of service studies in both State jurisdictions, indicating the cost of serving various classes of its retail customers. The State commissions require that historic test years be used in the cost of service studies which are designed to reflect the need for and extent of rate relief. The cost of service study computing I&M's cost of service in such historic test year is filed with the State commissions, accompanied by expert testimony supporting a specific proposed rate of return on such cost of service, and a set of tariffs designed to yield revenue equal to the cost of service plus the specified proposed rate of return.

16. Pursuant to the regulations of the Federal Commission, and pursuant to the Federal Power Act, the wholesale tariffs filed by I&M in the federal jurisdiction become effective 30 days after filing, subject to refund, unless the Federal Commission suspends the effective date of such

tariffs; such a suspension may be for any period between one day and a maximum of five months. Following any period of suspension specified by the Federal Commission, I&M's tariffs become effective as filed, subject to refund. Refunds are payable after the issuance of an order by the Federal Commission setting I&M's wholesale rates at a level lower than the rates being collected subject to refund, or pursuant to any settlement reached with any class of customers, and approved by the Federal Commission.

17. Pursuant to the regulations of the State jurisdictional commissions, no rate increase under I&M's retail tariffs in the State jurisdictions becomes effective until the State commission issues an order setting the level of I&M's rates and until I&M subsequenty files tariffs from which I&M would derive the level of revenues specified in the order of the State commission.

18. Pursuant to the regulations of the Indiana and Michigan commissions, I&M is permitted to file supplemental petitions for emergency rate increases in connection with a filing for a rate increase. Such petitions for emergency rate increases do not specify a dollar amount of emergency increase. If the Commission rules that an emergency rate increase is appropriate, the commission sets the dollar amount thereof, after which I&M must file tariffs capable of generating the revenue specified by the commission in order to begin collecting the additional revenue.

19. Pursuant to the rules and regulations of the commission regulating I&M's three jurisdictional rates, I&M is not permitted to charge any customer or any class of customers a rate other than or different from the rate reflected in its effective tariffs.

Stipulation of Facts

20. Plaintiffs in these consolidated actions constitute ten of the fourteen members of a federal jurisdictional class of municipal wholesale customers who purchase electric power and energy from I&M.

21. Prior to April 16, 1963, FPC had never asserted jurisdiction over I&M's rates to its municipal wholesale for resale customers.

22. On April 16, 1963, FPC issued an "Order to Show Cause and Providing for Hearing" (Docket No. E-7089), and Trial Exhibit D-75 is a true and complete copy of that Order.

23. Each plaintiff in these consolidated actions intervened in FPC Docket No. E-7089, as members of one or more of the following Associations: Indiana Municipal Electric Association, the Indiana and Michigan Municipal Distributors Association, and the American Public Power Association, and Trial Exhibits D-76, D-77 and D-78 are true and complete copies of the petitions to intervene filed in that Docket by plaintiffs, either individually or as members of such Associations.

24. On June 11, 1965, FPC issued an "Opinion and Order Denying Rehearing" in FPC Docket No. E-7089 (Opinion No. 458-A), and Trial Exhibit D-79 is a true and complete copy of that Opinion and Order.

25. On March 1, 1966, FPC issued an "Order Providing for Investigation and for Hearing" in FPC Docket No. E-7273, and Trial Exhibit D-80 is a true and complete copy of that Order.

26. Under date of December 20, 1967, I&M proposed (and subsequently filed with FPC) a "Statement of Offer

of Settlement" in FPC Docket No. E-7273 annexed to which was a supplement designated "Exhibit 1", and of which supplement Trial Exhibit D-80 is a true and complete copy.

27. On March 15, 1968, FPC issued an "Order Approving Offer of Settlement and Accepting Rate Schedule Filings" in FPC Docket No. E-7273. Trial Exhibit D-82 is a true and complete copy of that Order. That Order accepted for filing, among other things, Trial Exhibit D-83 as "Supplement No. 5" to the rate schedules filed by I&M for each of its wholesale for resale customers, including each of the plaintiff municipalities. That "Supplement No. 5" provided in part that:

> "Any term or provision of the Customer's currently effective FPC Rate Schedule and Exhibits thereto, as supplemented, to the contrary notwithstanding, a Customer of [I&M] may not change from the Customer's FPC Rate Schedule as the same may be in effect now or at any time in the future to any other rate schedule of [I&M] for municipal resale service without the written consent of [I&M], except that a Customer may elect to change from its currently effective FPC rate schedule, as supplemented, to Tariff MRS by notifying the Company in writing of such election and by entering into an agreement with [I&M] by providing for service under Tariff MRS the Customer's currently effective Rate Schedule shall terminate on the date service under Tariff MRS is deemed to have commenced. . . ."

The "FPC Rate Schedule" referenced as Trial Exhibit D-83 denotes the contracts, tariffs and other instruments filed under protest by I&M with FPC; and "Tariff MRS" referenced in Trial Exhibit D-83 denotes the tariff proposed by I&M as part of its "Statement of Offer of Settlement" in FPC Docket No. E-7273.

28. Prior to May 1968, each plaintiff was served with electric power and energy by I&M pursuant to an "Agreement", specifically identified for each plaintiff hereinafter. Each such Agreement specified the rate charged for such service either in terms of a reference to one of I&M's retail tariffs filed by I&M with the appropriate State jurisdictional commission and in effect, or by the specification of terms of service similar to an existing retail tariff of I&M.

29. In May 1968, each of the plaintiffs in these consolidated actions elected to enter into Agreements with I&M agreeing to be served by I&M under its Tariff MRS, and any successor tariffs, as the same may be modified pursuant to the rules and regulations of the Federal Commission. Trial Exhibits D-10, D-12, D-13B, D-14B, D-16, D-18, D-20, D-22, D-26, and D-28 are true and complete copies of Agreements entered into in May 1968 between I&M and each of the plaintiffs Avilla, Bluffton, Columbia City, Frankton, Garrett, Gas City, Mishawaka, New Carlisle, Niles and Warren, respectively.

30. At the time each plaintiff entered into Agreements with I&M in May 1968, each plaintiff believed that it would pay less for electric power and energy under FPC Tariff MRS than it would pay under the then-existing contractual rates and charges under which they were served by I&M. Four of I&M's municipal wholesale for resale customers elected to continue to be served under their existing contracts with I&M, specifically, Anderson, Auburn, Fort Wayne and Richmond, Indiana.

31. On August 22, 1968, the Secretary of the Federal Commission issued a letter, of which Trial Exhibit D-84 is a true and complete copy, accepting for filing the May 1968 contracts entered into between I&M and 12 of its municipal wholesale for resale customers (including the ten plaintiffs

herein); waiving the 30-day notice requirements of Section 205 of the Federal Power Act and Section 35.11 of FPC's Regulations thereunder; providing that the service agreements would become effective, for each of the plaintiffs herein, on dates between July 16 and July 23, 1968; and terminating FPC Docket No. E-7273 as it related to I&M. In July 1968, I&M commenced service to each of the plaintiffs herein under FPC Tariff MRS.

32. Prior to 1971, all of I&M's petitions for rate adjustment were petitions for reductions in its rates to its customers.

33. Between July 1971 and the date hereof, I&M has made 14 filings for rate increases in the three jurisdictions where its rates are subject to regulation: the Michigan, Indiana and Federal jurisdictions. The chronology of I&M's filings for retail and wholesale rate increases for the period 1968-1978, including the jurisdiction in which such petititon for rate increase was made and the designation of each proceeding, and the number of the Trial Exhibits constituting true and complete copies of the filings in those Dockets, is as follows:

Stipulation of Facts

Jurisdiction	*Date*	*Proceeding*	*Trial Exhibit No.*
MICHIGAN	July 30, 1971	Case No. U-3954	
INDIANA	July 30, 1971	Cause No. 32735	
FEDERAL	June 13, 1972	Docket No. E-7740	D-64A-C
INDIANA	August 29, 1974	Cause No. 33834	
INDIANA	September 3, 1974	Cause No. 33834, First Supplemental Petition for Emergency Rate Relief	
MICHIGAN	November 14, 1974	Case No. U-4704	
INDIANA	December 13, 1974	Cause No. 33834, Second Supplemental Petition for Emergency Rate Relief	
INDIANA	December 15, 1975	Cause No. 33834, Third Supplemental Petition for Emergency Rate Relief	
MICHIGAN	March 22, 1976	Case No. U-5073	D-67A-
FEDERAL	May 28, 1976	Docket No. ER76-716	D-65A-F
INDIANA	June 10, 1976	Cause No. 34588, Together with Request for Emergency Rate Relief	D-69A-K
MICHIGAN	November 14, 1977	Case No. U-5608	D-68A-B
INDIANA	January 30, 1978	Cause No. 35251	D-70
FEDERAL	May 17, 1978	Docket No. ER78-382	D-66A-F

34. The chronology of the effective dates of I&M's retail and wholesale rate increases between 1968 and 1978, including the jurisdiction in which such rate became effective, and the designation of each proceeding, is as follows:

Jurisdiction	*Effective Date*	*Proceeding*
INDIANA	March 29, 1972	Cause No. 32735
FEDERAL	December 14, 1972	Docket No. E-7740
MICHIGAN	March 24, 1973	Case No. U-3954
INDIANA	January 24, 1975	Cause No. 33834, First Supplemental Petition for Emergency Rate Relief
INDIANA	May 28, 1975	Cause No. 33834, Second Supplemental Petition for Emergency Rate Relief*
MICHIGAN	June 10, 1975	Case No. U-4704
FEDERAL	July 27, 1976	Docket No. ER76-716
MICHIGAN	September 19, 1976	Case No. U-5073
INDIANA	February 4, 1977	Cause No. 34588
INDIANA	September 22, 1978	Cause No. 35251
FEDERAL	December 23, 1978	Docket No. ER78-382

35. In the period 1968 through 1978, five Indiana jurisdictional rate increases have become effective, three Michi-

* PSCI denied I&M's Third Supplemental Petition for Emergency Rate Relief, filed on December 15, 1975, and directed I&M to make a full-scale filing for new rate relief.

gan jurisdictional rate increases have become effective, and two Federal jurisdictional rate increases have become effective; on December 23, 1978, a third Federal jurisdictional rate increase will have become effective. The Michigan Commission has not as yet set the rate level or the effective date of a rate increase in I&M's Case No. E-5608, filed on November 14, 1977.

36. On June 13, 1972, I&M filed with the Federal Commission "proposed changes in rates and charges and terms and conditions of service contained in wholesale Tariff MRS". By reason of a decision rendered by the United States Court of Appeals for the District of Columbia Circuit [502 F.2d 336; on rehearing 502 F.2d 343 (1974)], the proposed changes in I&M's rates and charges as filed on June 13, 1972 were directed by the Court to be permitted to become effective, subject to refund, on and after December 14, 1972. That rate increase was the first rate increase sought by I&M in the federal jurisdiction.

37. For the period commencing August 1968 (the first full month in which each plaintiff was served by I&M with electric power and energy pursuant to Tariff MRS), to and including December 1972, the comparison of the rate actually billed to plaintiffs with the retail rates then in effect in the Indiana and Michigan jurisdictions and which each plaintiff would have been charged had it been served on the retail tariff appropriate to its load and energy use characteristics, and which would have provided each plaintiff with the lowest cost of purchaed power in each month, shows that plaintiffs as a group paid $1,193,586.81 less as wholesale customers than they would have paid during such period had they been served on such retail tariffs. In this context, the term "otherwise applicable" excludes any tariff inapplicable on its face, such as I&M's residential tariffs and street lighting tariffs. The tariffs employed in arriving at the $1,193,586.81 figure were Tariff L.P. in Michigan, and Tariffs I.P., C.P. and Q.P. in Indiana. No single

Indiana tariff would provide all Indiana municipal plaintiffs with the lowest cost of purchased power in every month of that period.

38. Between December 14, 1972 to and including July 26, 1976, no change was made effective by FPC in the wholesale tariffs pursuant to which each of the plaintiff municipalities was served.

39. On July 30, 1971 defendant I&M filed with the Indiana Commission a request for a permanent increase in its retail rates of $16,500,000, and on March 24, 1972 the Indiana Commission issued an order in which it approved an increase in I&M's retail rates of approximately $16,280,000. The revised Indiana retail tariffs were made effective by the Indiana Commission on March 29, 1972.

40. On January 23, 1975 I&M was granted an emergency rate increase by the Indiana Commission, and on May 28, 1975, the Indiana Commission granted a further emergency increase to I&M.

41. For the period commencing January 1973 to and including July 1976, the comparison of the wholesale rate actually billed to plaintiffs, subject to refund, with the retail rates then in effect in the Indiana and Michigan jurisdictions and which each plaintiff would have been charged had it been served on the retail tariff appropriate to its load and energy use characteristics, and which would have provided each plaintiff with the lowest cost of purchased power in each month, shows that plaintiffs as a group paid $1,704,883.16 less as wholesale customers than they would have paid during such period had they been served on such retail tariffs. The following tables show the difference between such wholesale and such retail billings for each plaintiff at each delivery point in each month of the period January 1973 to and including July 1976, the positive numbers representing any excess of the wholesale rate over the retail rate:

Month/ Year	*Avilla*	*Bluffton (Horton St.)*	*Bluffton (State Rd.)*	*Columbia City*	*Frankton*	*Garrett*	*Gas City*	*New Carlisle*	*Niles*	*Warren*	*Month/ Year*
January '73	— 404.57	— 3601.92		— 3855.73	—4215.75	— 4484.91	— 3638.18	— 404.27	+ 3964.85	—1342.86	January '73
February	— 407.93	+ 3605.67		+ 5649.46	—2303.80	— 444.68	— 821.03	— 245.88	+15470.41	— 478.27	February
March	— 331.23	+ 5614.08		+ 5376.89	—1700.60	+ 70.35	— 448.56	— 220.54	+16101.80	— 231.65	March
April	— 552.82	+ 4904.71		+ 5398.24	—1430.47	— 735.69	— 1081.21	— 179.35	+11486.15	— 328.74	April
May	— 743.59	+ 4563.34		+ 4799.97	—1445.79	— 531.84	— 916.62	— 271.22	+11580.17	— 164.64	May
June	— 735.82	+ 6641.18		+ 5801.66	—1340.93	— 876.59	— 1025.23	— 205.58	+18815.18	— 357.48	June
July	— 767.28	+ 6667.36		+ 5293.00	—1265.60	— 887.69	— 1490.81	— 348.76	+19015.32	— 453.29	July
August	— 793.09	+ 5015.02		+ 4039.51	—1403.94	— 781.37	— 1420.45	— 391.08	+18824.88	— 473.67	August
September	— 258.53	+ 7543.06		+ 6138.87	—1389.97	— 320.62	— 966.54	— 312.61	+22887.68	— 708.84	September
October	— 830.06	+ 4704.20		+ 4604.28	—1546.60	— 1006.94	— 758.09	— 83.70	+15060.10	— 466.36	October
November	— 599.53	+ 5341.77		+ 5890.22	—2229.15	+ 231.41	— 696.25	— 113.25	+11923.12	— 401.14	November
December	— 330.18	+ 4980.30		+ 6539.68	—2188.98	+ 170.48	— 654.76	— 234.38	+14945.13	— 486.09	December
January '74	— 202.49	+ 4805.78		+ 6970.30	—2265.52	+ 208.39	— 731.00	— 206.10	+12325.84	— 290.68	January '74
February	— 370.51	+ 4656.66		+ 5454.27	—2690.86	+ 53.51	— 714.65	— 210.66	+12464.20	— 456.88	February
March	— 476.35	+ 5434.14		+ 6074.11	—1778.91	+ 430.96	— 868.88	— 258.67	+11303.88	— 478.61	March
April	— 576.35	+ 5053.00		+ 7355.77	—1372.62	+ 717.97	— 630.66	— 291.08	+ 9297.75	— 359.32	April
May	— 731.06	+ 5577.19		+ 5819.23	—1250.09	+ 452.01	— 1189.65	— 367.16	+11304.11	— 360.58	May
June	— 753.56	+ 5576.95		+ 5199.73	—1324.84	— 349.14	— 1032.79	— 418.28	+12810.66	— 456.67	June
July	— 509.73	+ 5431.33		+ 6606.18	—1488.30	— 1299.13	— 1561.80	— 498.58	+21899.71	— 711.82	July
August	— 779.61	+ 6315.98		+ 6223.45	—1718.97	— 1555.01	— 1493.63	— 508.24	+18211.45	— 611.56	August
September	— 407.87	+ 4400.34		+ 6536.05	—1304.19	— 1483.00	— 1007.61	— 406.63	+14886.62	— 803.72	September
October	— 828.49	+ 3671.25		+ 5535.91	—1437.03	— 48.72	— 936.80	— 536.84	+14007.13	— 594.55	October
November	— 446.74	+ 4595.46		+ 6796.42	—1560.25	— 68.14	— 494.22	— 218.48	+12824.88	— 436.73	November
December	— 425.91	+ 4019.53		+ 5829.44	—2299.51	— 1162.70	— 1715.49	— 412.59	+ 5330.62	— 585.94	December
January '75	— 405.56	+ 4103.12		+ 6353.83	—1770.57	— 356.33	— 761.39	— 356.94	+10117.03	— 555.49	January '75
February	—1305.88	— 7287.11		— 1540.04	—5413.24	— 5792.58	— 5418.03	—1482.17	+22685.76	—2301.41	February
March	—1346.42	— 4426.80		— 1077.68	—4251.79	— 5945.01	— 4644.52	—1199.25	+19451.90	—1950.29	March
April	—1510.20	— 5905.71		— 1068.56	—1980.02	— 5828.14	— 4509.11	—1251.08	+19936.84	—1882.05	April
May	—1460.14	— 4959.99		— 2237.93	—3432.02	— 4199.33	— 6021.27	—1182.18	+22629.57	—1913.44	May
June	—2068.43	— 8780.01	—4423.79	— 4475.01	—4218.22	— 8393.01	— 7277.66	—2127.95	— 4319.43	—3075.97	June
July	—2129.25	—11718.55	—4975.48	— 6163.72	—4843.62	— 8712.61	— 6544.32	—2148.35	—15253.79	—3301.57	July
August	—2175.84	—12300.52	—4918.61	— 1648.57	—5705.54	— 8922.59	— 7992.59	—2578.02	—33693.81	—4080.94	August
September	—2268.31	—12066.02	—5470.33	— 7649.15	—4776.11	— 9107.89	—10423.15	—2233.39	— 7504.31	—4082.77	September
October	—2375.25	—10294.98	—6252.09	— 7219.91	—5239.19	— 7946.44	— 7111.63	—2125.58	— 645.14	—2824.87	October
November	—2081.52	— 9756.09	—5315.32	— 5305.67	—5537.44	— 7649.43	— 7494.40	—1949.73	— 4368.93	—3192.77	November
December	—2074.65	—10805.03	—4994.79	— 6745.66	—7665.68	— 9204.12	— 7706.13	—2026.96	—14627.71	—3388.59	December
January '76	—2241.56	—12244.11	—5882.43	—10322.26	—9712.68	—11059.96	—10729.17	—2470.96	—23060.31	—4021.37	January '76
February	—1992.60	—10023.59	—5099.32	— 8724.21	—7470.31	— 9932.05	— 8997.73	—2140.70	—10474.60	—3377.48	February
March	—2241.59	—13256.43	—6295.83	— 9656.61	—6552.84	—10615.32	— 8334.72	—1950.88	—18267.12	—2670.98	March
April	—2105.75	— 9623.01	—5652.29	— 4843.72	—5009.72	— 7306.51	— 6525.53	—1602.29	—17915.48	—2542.21	April
May	—2013.03	— 7835.34	—5397.18	— 3988.60	—4120.39	— 6959.61	— 5739.34	—1274.30	—12081.29	—2207.42	May
June	—1907.25	— 9383.94	—4317.29	— 4589.60	—4211.13	— 8341.48	— 6429.67	—2062.75	—12327.06	—2281.99	June
July	—1838.26	— 9631.00	—4969.88	— 4000.65	—4615.19	— 7328.67	— 6934.94	—2233.55	—13275.82	—2462.89	July

Month/Year	*Bercado*	*Borley*	*Church*	*Grape*	*Logan*	*Russ*	*12th Street*	*Virgil*	*Month/Year*
January '73		— 5301.23	—4545.05	—2984.89	— 4749.37	— 5965.86	—4763.00	— 5395.01	January '73
February		— 1106.51	— 388.19	— 978.84	— 429.37	+ 56.48	— 728.95	— 374.03	February
March		— 360.60	— 141.18	— 815.12	— 75.87	+ 425.38	—1553.13	— 353.45	March
April		— 495.50	— 526.13	— 813.86	— 429.03	— 681.87	—1312.59	— 649.98	April
May		— 182.91	— 470.16	— 956.96	+ 271.89	— 852.30	—1371.36	— 325.48	May
June		+ 694.60	+ 285.85	—1373.20	+ 1651.73	— 439.70	—1699.04	+ 1076.32	June
July		— 258.45	— 129.19	—1523.31	+ 731.60	— 1570.92	—2233.44	+ 203.37	July
August		— 118.64	— 358.10	—1707.30	+ 285.62	— 1928.95	—2284.00	— 183.23	August
September		+ 723.06	+ 391.87	—1220.53	+ 1484.98	— 505.42	—1741.15	+ 981.78	September
October		— 1173.28	— 322.76	—1907.01	— 667.82	— 809.60	—2188.59	— 1539.89	October
November		— 3118.03	—2091.72	—1884.92	— 3147.75	— 1166.12	—2447.91	— 1788.29	November
December		— 5541.77	— 995.24	—2056.22	— 3150.97	— 828.41	—1738.71	— 1654.13	December
January '74		— 2994.11	—1154.97	—2222.69	— 3193.58	+ 4545.27	—1103.43	— 1532.57	January '74
February		— 3709.99	—1426.20	—2159.94	— 3112.32	— 2092.93	—1483.33	— 1926.22	February
March		— 4450.02	—1808.66	—2042.28	— 3222.57	— 1878.29	—1594.45	— 1086.08	March
April		— 2635.40	—2975.82	—2102.01	— 4071.99	— 3042.13	—2030.22	— 1216.37	April
May		— 1699.53	—2203.31	—2036.35	— 2734.52	— 1078.04	—2303.39	— 1821.30	May
June		— 946.88	+ 227.63	— 803.77	+ 1661.17	+ 11.35	—2149.85	+ 393.05	June
July		— 3536.54	— 420.78	—1281.71	+ 336.59	— 2175.32	—2593.71	— 478.77	July
August		— 950.20	— 349.42	—1221.84	+ 466.13	— 1950.10	—2497.57	— 835.98	August
September		— 691.60	+ 367.32	— 721.70	+ 1126.56	— 1371.06	—2269.98	+ 410.73	September
October		— 4183.51	—2886.42	—2311.23	— 4169.86	— 1904.78	—3641.93	— 2731.41	October
November		— 2430.76	—2284.17	—2438.28	— 3882.81	— 2404.79	—2807.43	— 1492.66	November
December		— 2529.04	—4614.38	—2236.49	— 3116.20	— 2376.08	—2969.73	— 1086.16	December
January '75		— 2503.63	—1087.85	— 402.09	— 2866.01	— 3180.38	—2257.94	— 879.32	January '75
February		— 7849.49	—5371.34	—3220.06	— 8751.84	— 9372.16	—3778.53	— 6263.18	February
March		— 7424.50	—6134.55	—3188.41	— 8781.58	— 9816.95	—5584.96	— 8700.33	March
April		— 7930.38	—6503.15	—3723.97	— 9747.93	—10115.98	—5929.15	— 9209.40	April
May		— 1558.16	—3650.73	—2738.42	— 3837.25	— 6177.90	—5127.73	— 4697.14	May
June		— 8240.99	—7292.17	—5903.96	— 8537.95	—11959.51	—8165.19	— 8751.03	June
July		— 9975.65	—8034.64	—6958.34	—10310.43	—12729.33	—9118.20	—10506.00	July
August		—10233.42	—8485.03	—7474.63	—10327.72	—13768.37	—9476.47	—10747.39	August
September		— 9386.30	—8278.98	—7384.23	—10034.02	—12805.41	—9277.45	— 9543.82	September
October		—10672.98	—8440.19	—5834.91	—11268.21	—12432.58	—9688.55	— 9999.10	October
November		— 9488.12	—9019.62	—6304.65	—11359.13	—12346.37	—7613.19	—11016.47	November
December		—10105.51	—8115.61	—5855.05	—11059.97	—11044.28	—5957.86	—11057.68	December
January '76		— 8852.31	—7848.10	—6039.92	— 9775.14	— 9230.64	—9353.13	— 8567.96	January '76
February		— 8388.92	—7194.33	—5340.82	— 8590.36	— 8924.28	—7813.30	— 8074.50	February
March		— 9350.50	—7308.60	—5492.52	— 9290.13	— 9651.15	—8182.47	— 8087.67	March
April		— 8950.66	—5729.48	—4113.46	— 7173.44	— 7750.67	—7448.98	— 5654.14	April
May	—1386.73	— 5927.84	—5173.05	—4225.59	— 6400.16	— 7515.59	—7267.74	— 4197.69	May
June	—1176.11	— 7036.21	—6063.68	—5616.05	— 6308.57	— 8856.48	—6296.00	— 6517.20	June
July	—1044.93	— 6578.24	—6078.19	—5244.59	— 5694.17	— 8727.38	—5944.37	— 6153.51	July

42. The following table reflects, for each plaintiff for the period commencing January 1973 to and including July 1976, the total difference between the wholesale and retail rates compared in the tables within Stipulated Fact No. 41, the positive numbers representing any excess of the wholesale rate over the retail rate:

Avilla	$—	48,804.79
Bluffton	—	125,532.16
Columbia City	+	45,172.39
Frankton	—	141,478.37
Garrett	—	157,302.17
Gas City	—	155,890.21
Mishawaka	—	1,258,906.94
New Carlisle	—	41,740.96
Warren	—	64,154.59
Niles	+	243,755.74
Total	$—	1,704,883.16

43. The 45-month period commencing January 1973 to and including July 1976 represents the entire effective period of the rate collected by I&M subject to refund under I&M's June 13, 1972 filing with FPC (Docket No. E-7740). On August 19, 1976, Administrative Law Judge George P. Lewnes issued his Initial Decision in Docket No. E-7740. In 1977, pursuant to the settlement of Docket No. E-7740, I&M paid a total of $1,678,511.68 in refunds, plus interest, to plaintiffs as a group. The refund paid to each plaintiff, exclusive of interest, was as follows:

Avilla	$ 524.35
Bluffton	189,985.00
Columbia City	181,900.13
Frankton	42,245.61
Garrett	90,742.90
Gas City	79,639.56
Mishawaka	767,143.53
New Carlisle	3,880.02
Warren	19,155.10
Niles	303,295.48
Total	$1,678,511.68

Stipulation of Facts

44. When the total refunds are allocated among the several plaintiffs, the difference between the wholesale and retail rates for the period January 1973 to and including July 1976 calculated as set forth in the prior Stipulated Fact and adjusted for refunds (without interest) applicable to that period, is as follows (a positive number would reflect any excess of the wholesale rate over the retail rate):

Avilla	$— 49,329.14
Bluffton	— 315,517.16
Columbia City	— 136,727.74
Frankton	— 183,723.98
Garrett	— 248,045.07
Gas City	— 235,529.77
Mishawaka	— 2,026,050.47
New Carlisle	— 45,620.98
Warren	— 83,309.69
Niles	— 59,539.74
Total	$— 3,384,394.07

45. On March 22, 1976, I&M filed with the Michigan Commission a request for a permanent increase in its retail rates (Cause No. U-5073). In its case-in-chief in that case, I&M requested that its retail rates be increased by $12,780,420.

46. On May 28, 1976, I&M filed with the Federal Commission a request for an increase in its wholesale rates and charges; that filing affected the tariffs upon which each of the plaintiff municipalities was then, and is now, being served. The proposed increased rates and charges filed on that date with the Federal Commission were permitted to become effective, subject to refund, on and after July 27, 1976. Those rates are still in effect, subject to refund, and will remain in effect through December 22, 1978.

47. On June 10, 1976, I&M filed a petition for a rate increase with the Indiana Commission, together with a request for an emergency rate increase; in that Cause, I&M

sought $75,050,000 in an Indiana jurisdictional rate increase. The Indiana Commission ultimately granted $41,771,477 of the rate increase sought by I&M in that Cause.

48. In response to plaintiffs' Interrogatory No. 1 of May 26, 1978, defendants provided plaintiffs with a comparative billing analysis. Part of that analysis covered the period commencing August 1976 (the first full month in which I&M's second wholesale rate increase was effective) to and including December 1977 (the month in which plaintiffs filed Civil Action No. S 77-0209, together with a motion for a preliminary injunction in that action). The analysis provided by defendants contained a comparison of the wholesale rate actually billed to plaintiffs, subject to refund, with the Indiana and Michigan commissions and on which each plaintiff would have been charged pursuant to such proposed filings had it been served on the retail tariff appropriate to its load and energy use characteristics, and which would have provided each plaintiff with the lowest cost of purchased power and energy in each month. As used herein, the term "retail tariff appropriate to its load and energy use characteristics" excludes any tariff inapplicable on its face, such as I&M's residential and street lighting tariffs. The retail tariffs utilized in the analysis were Tariff L.P. in Michigan and Tariffs I.P., Q.P. and C.P. in Indiana. No single Indiana tariff would provide all Indiana municipal plaintiffs with the lowest cost of purchased power in every month of that period. The analysis, prepared on the basis set forth above, and as to which plaintiffs claim, and reserve, a right to object and to offer a witness or witnesses to rebut, shows that plaintiffs as a group paid $335,822.74 more during the period August 1976 to and including December 1977 as wholesale customers than they would have paid during such period had they been served on such retail tariffs. The following table shows the difference between such actual wholesale rate, subject to refund, and such proposed retail rates, for each plaintiff at each delivery point in each month of the period August 1976 to and including December 1977, with positive numbers representing any excess of wholesale charges over retail charges:

Month/Year	*Avilla*	*Bluffton (Horton St.)*	*Bluffton (State Rd.)*	*Columbia City*	*Frankton*	*Garrett*	*Gas City*	*New Carlisle*	*Niles*	*Warren*	*Month/Year*
August 1976	—2305.28	—10691.34	—2483.42	— 5589.60	—1665.21	—8262.36	—4299.41	—1306.75	+20144.24	—1803.09	August 1976
September	—2495.21	—10287.04	—3452.65	— 2434.41	—3014.95	—8408.02	—4277.03	—1525.25	+26969.78	—3141.45	September
October	—1296.70	— 234.75	—2954:51	+ 8367.60	—1465.90	—2256.93	—2839.36	—1583.47	+ 9240.99	—2370.25	October
November	—1620.02	— 2509.38	—5201.21	+ 482.21	—3199.83	—7544.45	—4493.16	—1178.66	+ 4263.14	—2049.11	November
December	— 585.06	+ 5668.59	+1023.24	+10392.01	—3718.72	+ 115.89	+1039.66	+ 509.02	+14876.64	— 450.28	December
January 1977	— 99.57	+12968.43	+3287.89	+19897.12	— 460.02	+5543.87	+4648.76	— 221.53	+38257.32	+ 144.47	January 1977
February	—1088.83	— 1367.71	—2286.54	+ 3334.36	—2712.12	—4192.46	— 988.53	—1085.45	+20144.80	—1277.37	February
March	—1897.15	—10186.45	—6262.82	— 3656.99	—4283.36	—7903.95	—2964.66	—1394.82	+ 103.70	—1502.19	March
April	— 791.30	+ 8655.75	+ 249.37	+12051.68	— 83.70	+1185.28	—2411.39	— 661.42	—23359.17	+ 37.39	April
May	—1379.83	+ 7709.28	+ 646.67	+11974.92	— 443.32	—2192.13	—4602.93	— 678.29	+ 2898.25	— 53.60	May
June	—1389.62	— 4505.58	—3082.67	+ 4122.37	—1543.26	—6361.55	—2416.07	— 799.93	+70203.85	— 365.64	June
July	— 600.32	+ 1003.88	— 704.18	+ 9814.01	—2403.68	—1693.65	—1543.42	— 965.96	+78765.34	— 507.89	July
August	— 743.30	+15906.65	+2672.51	+20425.58	+1199.33	+ 189.16	+2167.75	+ 378.96	+52673.39	+1162.67	August
September	+ 109.80	+13143.96	+3406.18	+17361.32	+ 157.30	— 417.66	+4330.43	+ 322.51	+28803.45	+1454.43	September
October	—1057.87	+ 5429.69	—1447.72	+ 6396.33	— 828.87	— 258.57	—2335.27	—1583.15	+29029.60	— 66.47	October
November	— 354.94	+11438.23	+ 715.58	+10925.82	+ 157.64	+ 377.08	+1340.64	— 651.76	+30166.24	+ 219.28	November
December	—1393.64	— 2338.14	—4556.96	+81717.77	—3560.27	—6187.94	—2873.91	—1259.10	+35573.85	—1514.80	December

MISHAWAKA

Month/Year	*Bercado*	*Borley*	*Church*	*Grape*	*Logan*	*Russ*	*12th Street*	*Virgil*	*Month/Year*
August 1976	—1274.87	—2529.13	—3355.66	—2803.87	— 822.85	—5980.41	—3898.29	—2225.56	August 1976
September	— 422.25	—1283.73	—2864.06	—2881.68	— 2683.79	—5280.41	—3056.73	—1903.30	September
October	+ 657.67	—8074.26	—1106.13	—1344.56	— 6864.26	—3943.65	—2598.44	—6263.05	October
November	— 943.31	—9174.23	—7936.74	—5288.62	— 9722.54	—9871.37	—6925.94	—8663.08	November
December	+ 739.13	—3425.92	— 126.72	+2271.61	— 2402.98	— 977.61	+ 786.63	—3639.12	December
January 1977	+1953.24	+1355.06	+2645.83	+2569.26	+ 3649.11	+5320.30	+1651.80	+1943.04	January 1977
February	— 139.11	—4658.59	—3875.78	—1744.62	— 2416.66	—1906.41	—3088.90	—3367.36	February
March	—1403.86	—7964.50	—8183.72	—4711.33	— 7296.96	—6176.69	—5939.01	—6865.38	March
April	+ 224.22	— 882.26	+ 509.17	— 234.55	+ 3025.59	— 162.87	+1650.33	— 95.04	April
May	+ 524.87	+2816.26	+4080.96	— 200.95	+ 6295.59	+ 872.85	+2247.27	+3206.46	May
June	— 244.76	— 928.37	+1283.31	+ 187.83	+ 1535.66	—1367.26	— 183.49	—1337.93	June
July	— 420.75	+1830.72	+2619.02	+1298.72	+ 3604.62	—1043.82	+6605.63	+1964.64	July
August	+1008.82	+4284.77	+5167.17	+1543.57	+ 3669.95	+2050.02	+1754.88	+3100.64	August
September	+ 707.68	+7834.73	+8085.73	+5004.31	+10343.46	+4622.72	+6814.08	+8279.16	September
October	— 28.31	—8693.51	—7032.83	—3858.66	— 7164.39	—4923.35	—6138.71	—6373.96	October
November	— 333.20	—3933.37	—5361.44	— 627.63	— 5351.63	—3162.72	—4101.43	—4092.74	November
December	— 337.35	—7946.20	—4311.50	—2192.74	— 7976.79	—7073.01	—4435.67	—6858.18	December

49. The following table reflects, for each plaintiff, for the period commencing August 1976 to and including December 1977, the total difference between the actual wholesale and retail rates, as proposed in filings made by I&M, compared in the preceding tables within Stipulated Fact No. 48, the positive numbers representing any excess of the wholesale rate over the retail rates, as filed:

	Billings
Avilla	$— 18,988.84
Bluffton	+ 19,372.83
Columbia City	+ 205,582.10
Frankton	— 26,982.30
Garrett	— 48,268.39
Gas City	— 22,467.90
Mishawaka	— 185,411.22
New Carlisle	— 13,685.05
Niles	+ 438,755.41
Warren	— 12,083.90
Total	$+ 335,822.74

50. During the period August 1976 to and including December 1977 I&M's actual billings subject to refund, to plaintiffs as a group, totalled $20,959,534.51. The $335,-822.74 total differential as reflected in Stipulated Fact No. 49 represents 1.6022% of I&M's total billings to all ten plaintiffs during that seventeen (17) month period.

51. In response to plaintiffs' Interrogatory No. 1 of May 26, 1978 defendants provided plaintiffs with a comparative billing analysis. Part of that analysis covered the period commencing January 1978 to and including December 1978 (the "test year" utilized by I&M in its May 17, 1978 filing for increases in its wholesale rates to, among others, plaintiffs in FERC Docket No. ER78-382). The analysis provided by defendants contained a comparison of

the wholesale rate as proposed in that filing, applied to the projected billing determinants for calendar year 1978 as contained in that filing, with the proposed rates filed by I&M with the Michigan Commission on November 4, 1977 and with the Indiana Commission on January 30, 1978, and on which each plaintiff would have been charged pursuant to such proposed rates had it been served on the retail tariff appropriate to its load and energy use characteristics, and which would have provided each plaintiff with the lowest cost of purchased power and energy in each month. As used herein, the term "retail tariff appropriate to its load and energy use characteristics" excludes any tariff inapplicable on its face, such as I&M's residential and street lighting tariffs. The retail tariffs utilized in the analysis were Tariff L.P. in Michigan and Tariffs I.P., Q.P. and C.P. in Indiana. No single Indiana tariff would provide all Indiana municipal plaintiffs with the lowest cost of purchased power in every month of that period. The analysis, prepared on the basis set forth above, and as to which plaintiffs claim, and reserve, a right to object and to offer a witness or witnesses to rebut, shows that plaintiffs as a group were projected to pay $1,262,674.77 less during the period January 1978 to and including December 1978 as wholesale customers than they were projected to pay during such period had they been served on such proposed retail tariffs. The following table shows the difference between such proposed wholesale rate and such proposed retail rates, for each plaintiff at each delivery point in each month of the period January 1978 to and including December 1978, with positive numbers representing any excess of wholesale charges over retail charges:

Month/Year	*Avilla*	*Bluffton Horton St*	*Bluffton State. Rd.*	*Columbia City*	*Frankton*	*Garrett*	*Gas City*	*New Carlisle*	*Niles*	*Warren*	*Month/Year*
January 1978	—3222.03	—14066.25	—4113.58	— 5971.87	—9500.76	—12337.69	—13383.21	—3199.85	—32503.08	—5280.54	January 1978
February	—2464.87	— 9261.14	—5487.24	— 6041.71	—5803.94	—10855.95	— 7908.36	—2218.29	—16258.41	—3839.82	February
March	—3136.87	—18896.03	—7370.56	—11644.79	—6840.70	—13814.69	— 7112.78	—2151.56	— 9040.55	—3071.06	March
April	—2395.13	— 7157.53	—1486.88	— 1840.92	—4488.65	— 8512.95	—10542.30	—2306.56	+12682.52	—2877.84	April
May	—2623.93	— 4160.93	— 487.98	+ 3530.78	—3898.55	—10105.72	—10934.79	—1424.55	+14752.22	—2001.73	May
June	—2519.11	—14294.05	—4260.47	— 972.52	—5053.23	—12520.11	— 7449.73	—1776.60	+ 7498.61	—2151.69	June
July	—2863.10	—10668.21	—3448.41	+ 3465.36	—5395.61	— 9557.74	—11678.49	—2550.60	— 2320.97	—3242.35	July
August	—3152.19	— 8592.90	—4975.92	— 601.40	—4742.57	—13239.36	— 9989.13	—2584.82	— 4057.51	—2994.90	August
September	—2550.79	—11897.92	—2725.73	— 104.70	—5586.12	—12735.54	— 8969.57	—2643.10	+19045.79	—3432.60	September
October	—2684.53	— 9007.35	—4810.49	— 3498.65	—5102.02	—10025.09	— 8943.32	—3295.54	+24734.77	—2578.13	October
November	—2347.35	— 2628.18	—3076.27	+ 1116.52	—2934.27	— 8221.16	— 5599.52	—2333.21	+ 9213.35	—2477.01	November
December	—2894.20	—10096.14	—8918.00	— 7782.90	—6838.75	—12269.35	— 9281.98	—2443.36	—19618.41	—3834.52	December

Mishawaka

Month/Year	*Bercado*	*Borley*	*Church*	*Grape*	*Logan*	*Russ*	*12th Street*	*Virgil*	*Month/Year*
January 1978	—3160.11	—11712.68	—11400.29	—7455.19	— 9948.66	— 7283.06	— 9793.33	—10190.35	January 1978
February	—1973.23	— 9796.89	— 9129.46	—5700.71	— 7853.72	— 6965.64	— 7599.17	— 7669.68	February
March	—2644.02	—12385.54	—12886.23	—8127.09	—11463.68	—10874.72	— 9164.23	—10841.85	March
April	—1461.47	— 7982.56	— 7105.45	—6453.54	— 6773.75	— 7592.34	— 3687.93	— 6884.27	April
May	— 609.66	— 1837.65	— 989.92	—2807.98	+ 1354.17	— 4405.88	— 1427.01	— 1643.43	May
June	— 471.34	— 4083.50	— 2944.63	—3667.95	— 1581.23	— 7008.71	— 3114.56	— 5111.50	June
July	—1353.60	— 3318.74	— 4739.43	—4726.46	— 1996.11	— 8929.06	+ 1950.20	— 4303.82	July
August	— 860.82	— 8607.45	— 9512.01	—8308.03	— 9933.85	—11116.84	— 9607.37	— 9341.24	August
September	— 589.67	— 2096.26	— 3499.28	—2562.71	— 28.36	— 4806.77	— 1971.69	— 855.54	September
October	—1401.02	—16412.82	—17872.30	—9980.31	—15031.96	—12212.23	—13245.35	—13496.29	October
November	—1821.74	—10762.52	—14398.10	—6239.09	—12468.47	— 7763.13	—10691.50	—10773.18	November
December	—1767.91	—11751.08	—10155.61	—6064.40	—13465.18	— 8139.15	— 9043.42	—12448.68	December

52. The following table reflects, for each plaintiff for 1978, the total difference between the proposed wholesale and retail rates compared in the preceding tables within Stipulated Fact No. 51, the positive numbers representing any excess of the proposed wholesale rate over the proposed retail rates:

Avilla	$—	32,854.10
Bluffton	—	171,886.16
Columbia City	—	30,346.80
Frankton	—	66,185.17
Garrett	—	134,195.35
Gas City	—	111,793.18
Mishawaka	—	652,832.17
New Carlisle	—	28,927.98
Warren	—	37,782.19
Niles	+	4,128.33
Total	$—	1,262,674.77

53. In response to plaintiffs' Interrogatory No. 1 of May 26, 1978 and Interrogatory Nos. "10" to and including "31" of August 30, 1978, and reserving to defendants on trial all conditions and reservations of rights set forth in the responses to the latter Interrogatories, defendants provided plaintiffs with a comparative billing analysis. That analysis covered the period commencing August 1976 to and including August 1978. The analysis provided by defendants contained a comparison of the wholesale rates actually billed to plaintiffs, subject to refund, with various retail rates which, during that period, were in effect and had been approved, at a level lower than proposed by I&M in its filings, by the Indiana and Michigan commissions and on which each plaintiff would have been charged had it been served on the retail tariff appropriate to its load and energy use characteristics, and which would have provided each plaintiff with the lowest cost of purchased power and

energy in each month. As used herein, the term "retail tariff appropriate to its load and energy use characteristics" excludes any tariff inapplicable on its face, such as I&M's residential and street lighting tariffs. The retail tariffs utilized in the analysis were Tariff L.P. in Michigan, and Tariffs I.P., Q.P. and C.P. in Indiana. No single Indiana tariff would provide all Indiana municipal plaintiffs with the lowest cost of purchased power in every month of that period. The analysis, prepared on the basis set forth above, and as to which defendants claim, and reserve, a right to object and to offer a witness or witnesses to rebut, shows that plaintiffs as a group paid $4,049,461.97 more during the period August 1976 to and including August 1978 as wholesale customers than they would have paid during such period had they been served on such retail tariffs. The following table shows the difference between such actual wholesale rate, subject to refund, and such in effect retail rates, as so reduced by the State Commissions to levels below those sought by I&M in its filings, for each plaintiff at each delivery point in each month of the period August 1976 to and including August 1978, with positive numbers representing any excess of wholesale charges over retail charges:

Stipulation of Facts

TOWN OF AVILLA, INDIANA

August, 1976 through August, 1978

	A	*B*	*C*
Month	*Wholesale*	*Retail*	*Difference (A-B)*
1976			
Aug.	$ 8846.81	$ 8118.53	$ 728.28
Sept.	8546.51	7698.97	847.54
Oct.	9235.06	7387.64	1847.42
Nov.	11133.92	8928.02	2205.90
Dec.	14060.28	10252.63	3807.65
	TOTAL: 8/76-12/76		+ $ 9,436.79
1977			
Jan.	$15950.11	$11476.66	$ 4473.45
Feb.	14407.61	13633.90	773.71
Mar.	11574.25	11768.54	– 194.29
April	10353.88	9701.38	652.50
May	10056.46	10004.32	52.14
June	9748.69	9799.96	– 51.27
July	11745.01	10846.62	898.39
Aug.	10661.80	9972.54	689.26
Sept.	11482.19	9992.97	1489.22
Oct.	11153.44	10771.50	381.94
Nov.	12800.45	11667.29	1133.16
Dec.	15429.08	14896.39	532.69
	TOTAL: 1977		+ $ 10,830.90
1978			
Jan.	$17356.33	$17501.66	$– 145.33
Feb.	15377.97	15387.47	– 9.50
Mar.	13378.98	14028.85	– 649.87
April	15226.94	14614.56	612.38
May	12491.98	13814.55	– 1322.57
June	10772.81	12519.00	– 1746.19
July	12860.66	14209.98	– 1349.32
Aug.	13392.77	12244.56	1148.21
	TOTAL: 1/78-8/78		— $ 3,462.19

Stipulation of Facts

CITY OF BLUFFTON, INDIANA

Horton Delivery Point

August, 1976 through August, 1978

Month	*A* *Wholesale*	*B* *Retail*	*C* *Difference (A-B)*
1976			
Aug.	$120033.60	$95802.90	$ 24230.70
Sept.	125268.04	93824.41	31443.63
Oct.	123361.57	86197.02	37164.55
Nov.	127462.62	90611.75	36850.87
Dec.	146016.57	97800.46	48216.11
	TOTAL:	8/76-12/76	+ $177,905.86
1977			
Jan.	$160989.92	$105819.29	$ 55170.63
Feb.	143238.57	127404.59	15833.98
Mar.	137508.20	129056.60	8451.60
April	136752.76	111435.99	25316.77
May	142053.01	117589.29	24463.72
June	151598.47	137635.00	13963.47
July	157632.72	137816.36	19816.36
Aug.	154069.07	120856.25	33212.82
Sept.	158326.27	127760.68	30565.59
Oct.	145575.18	123840.91	21734.27
Nov.	157484.46	129830.64	27653.82
Dec.	158743.73	142948.10	15795.63
	TOTAL:	1977	+ $291,978.66
1978			
Jan.	$131801.19	$120445.47	$ 11355.72
Feb.	130294.36	128356.96	1937.40
Mar.	118660.24	116312.25	2347.99
April	143535.25	127216.97	16318.28
May	142908.29	133897.32	9010.97
June	130515.15	133502.96	- 2987.81
July	142223.73	135073.39	7150.34
Aug.	149821.49	114019.82	35801.67
	TOTAL:	1/78-8/78	+ $ 80,934.56

Stipulation of Facts

CITY OF BLUFFTON, INDIANA

SR-1 Delivery Point

August, 1976 through August, 1978

	A	*B*	*C*
Month	*Wholesale*	*Retail*	*Difference (A-B)*
1976			
Aug.	$30966.33	$24452.28	$ 6514.05
Sept.	28976.78	22606.97	6369.81
Oct.	26723.58	20839.23	5884.35
Nov.	27895.21	23198.84	4696.37
Dec.	38596.97	26296.05	12300.92
	TOTAL: 7/76-12/76		+ $35,765.50
1977			
Jan.	$48386.71	$32277.21	$16109.50
Feb.	43119.31	39984.77	3134.54
Mar.	34244.36	35389.25	- 1144.89
April	31436.77	27148.13	4288.64
May	32016.21	27443.82	4572.39
June	36088.53	34497.98	1590.55
July	40359.86	36102.79	4257.07
Aug.	49457.65	40915.65	8542.00
Sept.	48778.20	39892.30	8885.90
Oct.	39405.42	36066.38	3339.04
Nov.	46490.64	40646.16	5844.48
Dec.	61394.21	58500.43	2893.78
	TOTAL: 1977		+ $62,313.00
1978			
Jan.	$97918.79	$87354.04	$10564.75
Feb.	79519.37	70195.74	9323.63
Mar.	70491.63	67708.26	2783.37
April	50974.68	54264.43	- 3289.75
May	40805.41	53222.28	-12416.87
June	47406.07	51410.04	- 4003.97
July	47406.07	51410.04	- 4003.97
Aug.	55367.77	49622.50	5745.27
	TOTAL: 1/78-8/78		- $3,178.93

Stipulation of Facts

CITY OF COLUMBIA CITY, INDIANA

August, 1976 through August, 1978

Month	*A* *Wholesale*	*B* *Retail*	*C* *Difference (B-C)*
1976			
Aug.	$107912.03	$83125.45	$24786.58
Sept.	119237.55	84261.09	34976.46
Oct.	115221.25	74569.93	40651.32
Nov.	120946.74	83990.35	36956.39
Dec.	150228.24	97485.01	52743.23
	TOTAL: 8/76-12/76		+ $190,113.98
1977			
Jan.	$170521.14	$107677.72	$62843.42
Feb.	148724.27	128114.73	20609.54
Mar.	133661.05	119989.99	13671.06
April	123639.09	97067.76	26571.35
May	122281.88	96548.87	25733.01
June	130472.13	111378.78	19093.35
July	137821.92	112610.41	25211.51
Aug.	151359.96	114532.53	36827.43
Sept.	142106.24	109765.96	32340.28
Oct.	127359.95	106906.80	20453.15
Nov.	139092.58	113974.32	25118.26
Dec.	160954.57	142211.56	18743.01
	TOTAL: 1977		+ $327,215.37
1978			
Jan.	$168939.33	$147431.29	$21508.04
Feb.	156557.58	136577.11	19980.47
Mar.	142176.47	132984.97	9191.50
April	139962.46	121990.50	17971.96
May	121164.15	117576.55	3587.60
June	116007.50	116821.90	- 814.40
July	125566.69	110632.87	14933.82
Aug.	152955.27	111733.30	41221.97
	TOTAL: 1/78-8/78		+ $127,580.96

Stipulation of Facts

TOWN OF FRANKTON, INDIANA

August, 1976 through August, 1978

	A	*B*	*C*
Month	*Wholesale*	*Retail*	*Difference (A-B)*
1976			
Aug.	$24375.04	$19902.75	$ 4472.29
Sept.	24574.66	20185.48	4389.18
Oct.	28151.55	21847.84	6303.71
Nov.	35140.53	28266.24	6874.29
Dec.	45643.40	36353.24	9290.16
	TOTAL: 7/76-12/76		+ $31,329.63
1977			
Jan.	$54375.68	$41088.77	$13286.91
Feb.	49872.37	47044.65	2827.72
Mar.	32898.04	33071.62	- 173.58
April	30208.91	26863.75	3345.16
May	27646.30	24221.80	3424.50
June	28486.81	26865.62	1621.19
July	29903.66	28868.76	1034.90
Aug.	29536.54	25221.19	4315.35
Sept.	31130.94	27679.52	3451.42
Oct.	30808.90	28356.90	2452.00
Nov.	37967.97	34040.07	3927.90
Dec.	50649.88	48750.36	1899.52
	TOTAL: 1977		+ $41,412.99
1978			
Jan.	$57521.09	$56727.43	$ 793.66
Feb.	51648.50	51458.09	190.41
Mar.	41792.47	44460.28	- 2667.81
April	37515.28	34593.79	2921.49
May	31906.11	31940.69	- 34.58
June	29382.34	29467.24	- 84.90
July	29684.45	28594.38	1090.07
Aug.	32537.22	26212.80	6324.42
	TOTAL: 1/78-8/78		+ $8,532.76

CITY OF GARRETT, INDIANA

August, 1976 through August, 1978

	A	*B*	*C*
Month	*Wholesale*	*Retail*	*Difference (A-B)*
1976			
Aug.	$58632.30	$48954.12	$ 9678.18
Sept.	59616.19	47234.38	12381.81
Oct.	66386.33	48015.82	18370.51
Nov.	75564.06	58050.60	17513.46
Dec.	90249.33	62954.14	27295.19
	TOTAL: 8/76-12/76		+ $85,239.15
1977			
Jan.	$108061.28	$73364.96	$34696.32
Feb.	92939.39	85555.74	7383.65
Mar.	81555.85	78156.92	3398.93
April	74456.67	63748.64	10708.03
May	69498.22	62733.10	6765.12
June	65778.62	63538.25	2240.37
July	70893.91	63824.62	7069.29
Aug.	71227.79	62125.65	9102.14
Sept.	71480.81	63224.78	8256.03
Oct.	79518.87	70440.50	9078.37
Nov.	83911.44	74208.74	9702.70
Dec.	96415.74	91012.23	5403.51
	TOTAL: 1977		+ $113,804.46
1978			
Jan.	$106483.04	$100437.56	$ 6045.48
Feb.	97679.25	93581.84	4097.41
Mar.	85308.60	83667.72	1640.88
April	85815.07	82836.12	2978.95
May	71844.11	78014.75	- 6170.64
June	62995.31	71466.23	- 8470.92
July	68374.11	69010.71	- 636.60
Aug.	74326.31	60957.66	13368.65
	TOTAL: 1/78-8/78		+ $12,853.21

Stipulation of Facts

CITY OF GAS CITY, INDIANA

August, 1976 through August, 1978

	A	*B*	*C*
Month	*Wholesale*	*Retail*	*Difference (A-B)*
1976			
Aug.	$51848.28	$41004.33	$10843.95
Sept.	53407.06	40137.63	13269.43
Oct.	53476.32	39409.82	14066.50
Nov.	60847.85	45697.59	15150.26
Dec.	78743.55	54315.62	24427.93
	TOTAL: 8/76-12/76		+ $77,758.07
1977			
Jan.	$100579.59	$68644.90	$31934.69
Feb.	84854.02	75582.14	9271.88
Mar.	63966.41	58469.99	5496.42
April	57456.62	52096.43	5360.19
May	52764.64	50186.98	2577.66
June	59232.72	54265.13	4967.59
July	72198.30	64834.76	7363.54
Aug.	63088.81	53270.20	9818.61
Sept.	70138.15	57854.75	12283.40
Oct.	59963.39	54953.18	5010.21
Nov.	69982.52	60924.23	9058.29
Dec.	88663.09	81146.61	7516.48
	TOTAL: 1977		+ $110,658.96
1978			
Jan.	$104513.13	$95512.22	$ 9000.91
Feb.	91373.62	85711.04	5662.58
Mar.	68823.18	71721.93	- 2898.75
April	75341.54	72837.63	2503.91
May	59887.34	63995.90	- 4108.56
June	57476.87	65184.67	- 7707.80
July	67405.29	66458.74	946.55
Aug.	69333.20	57253.65	12079.55
	TOTAL: 1/78-8/78		+ $15,478.39

Stipulation of Facts

CITY OF MISHAWAKA, INDIANA

Bercado Delivery Point

August, 1976 through August, 1978

Month	*A* *Wholesale*	*B* *Retail*	*C* *Difference (A-B)*
1976			
Aug.	$ 9870.35	$ 8151.04	$ 1719.31
Sept.	10403.06	7538.41	2864.65
Oct.	13211.87	8812.40	4399.47
Nov.	16998.91	12557.64	4441.27
Dec.	25640.76	17436.87	8203.89
	TOTAL: 8/76-12/76		+ $21,628.59
1977			
Jan.	$33964.66	$22910.68	$11053.98
Feb.	28542.14	25241.05	3301.09
Mar.	19885.83	18599.48	1286.35
April	16596.45	14260.78	2335.67
May	16224.84	13954.90	2269.94
June	16191.90	14434.26	1757.64
July	16749.91	15071.02	1678.89
Aug.	17041.51	14015.74	3025.77
Sept.	17026.59	14316.51	2710.08
Oct.	17414.45	15354.94	2059.51
Nov.	18628.40	16779.29	1849.11
Dec.	28646.05	25665.25	2980.80
	TOTAL: 1977		+ $36,308.83
1978			
Jan.	$30652.87	$29275.55	$ 1377.32
Feb.	30414.91	28596.55	1818.36
Mar.	25550.38	24337.82	1212.56
April	21743.74	20765.44	978.30
May	17764.44	17489.81	274.63
June	16330.88	15673.08	657.80
July	16927.32	16101.79	825.53
Aug.	17870.09	14411.73	3458.36
	TOTAL: 1/78-8/78		+ $10,602.86

Stipulation of Facts

CITY OF MISHAWAKA, INDIANA

Borley Delivery Point

August, 1976 through August, 1978

	A	*B*	*C*
Month	*Wholesale*	*Retail*	*Difference (A-B)*
1976			
Aug.	$73436.82	$55652.48	$17784.34
Sept.	69410.98	49162.22	20248.76
Oct.	53103.43	43258.30	9845.13
Nov.	56824.20	46585.84	10238.36
Dec.	65823.14	48832.45	16990.69
	TOTAL: 8/76-12/76		+ $75,107.28
1977			
Jan.	$73694.62	$53822.96	$19871.66
Feb.	63970.13	63442.47	527.66
Mar.	62983.39	64767.61	- 1784.22
April	59778.78	55462.80	4315.98
May	74647.52	62853.45	11794.07
June	78785.29	70216.74	8568.55
July	94448.87	81442.41	13006.46
Aug.	82115.32	68068.05	14047.27
Sept.	86432.87	69110.00	17322.87
Oct.	66399.95	66296.63	103.32
Nov.	72618.72	67982.47	4636.25
Dec.	77571.97	75840.85	1731.12
	TOTAL: 1977		+ $94,140.99
1978			
Jan.	$78443.28	$77438.14	$ 1005.14
Feb.	76470.46	71636.91	4833.55
Mar.	63883.68	66048.52	- 2164.84
April	71901.16	69967.32	1933.84
May	63990.81	70379.78	- 6388.97
June	75647.50	77405.66	- 1758.16
July	92093.82	87213.55	4880.27
Aug.	99703.94	76529.17	23174.77
	TOTAL: 1/78-8/78		+ $25,515.60

CITY OF MISHAWAKA, INDIANA

Church Delivery Point

August, 1976 through August, 1978

	A	*B*	*C*
Month	*Wholesale*	*Retail*	*Difference (A-B)*
1976			
Aug.	$62708.85	$48410.87	$14297.98
Sept.	60096.50	43772.62	16323.88
Oct.	51239.67	37208.24	14031.43
Nov.	58673.72	46472.39	12201.33
Dec.	70176.74	49106.84	21069.90
	TOTAL: 8/76-12/76		+ $77,924.52
1977			
Jan.	$81609.16	$56524.88	$25084.28
Feb.	68445.55	63705.88	4739.67
Mar.	59971.67	60196.89	- 225.22
April	63761.73	55026.08	8735.65
May	78480.97	65102.75	13378.22
June	81781.18	70911.41	10869.77
July	95607.08	81779.70	13827.38
Aug.	86213.55	70883.20	15330.35
Sept.	85979.40	68502.40	17477.00
Oct.	65590.51	64115.97	1474.54
Nov.	67574.53	64760.22	2814.31
Dec.	78504.78	73444.34	5060.44
	TOTAL: 1977		+ $118,566.39
1978			
Jan.	$78678.78	$79010.15	$- 331.37
Feb.	72747.85	73202.67	- 454.82
Mar.	65837.73	68325.31	- 2487.58
April	72067.72	69203.34	2864.38
May	63942.51	69148.73	- 5206.22
June	73672.45	74220.32	- 547.87
July	89698.61	84136.05	5562.56
Aug.	94432.09	72338.89	22093.20
	TOTAL: 1/78-8/78		+ $21,492.28

Stipulation of Facts

CITY OF MISHAWAKA, INDIANA

Grape Rd. Delivery Point

August, 1976 through August, 1978

	A	*B*	*C*
Month	*Wholesale*	*Retail*	*Difference (A-B)*
1976			
Aug.	$37961.06	$29765.36	$ 8195.70
Sept.	36494.17	27456.77	9037.40
Oct.	30994.18	23332.43	7661.75
Nov.	34594.25	28539.46	6054.79
Dec.	52944.80	35505.40	17439.40
	TOTAL: 8/76-12/76		+ $48,389.04
1977			
Jan.	$57854.95	$39558.69	$18296.26
Feb.	49306.75	44944.25	4362.50
Mar.	38458.52	38566.86	- 108.34
April	35483.88	32668.23	2815.65
May	43843.92	38533.16	5310.76
June	44964.86	39416.09	5548.77
July	58498.24	50273.40	8224.84
Aug.	47240.32	39961.64	7278.68
Sept.	51504.91	40864.54	10640.37
Oct.	40117.55	38789.00	1328.55
Nov.	44598.24	40110.12	4488.12
Dec.	56276.09	51811.32	4464.77
	TOTAL: 1977		+ $72,650.93
1978			
Jan.	$58715.10	$56116.39	$ 2598.71
Feb.	53172.10	51373.11	1798.99
Mar.	45944.19	47868.30	- 1924.11
April	46669.88	46923.52	- 253.64
May	39887.21	44194.44	- 4307.23
June	40873.56	44612.30	- 3738.74
July	51016.83	52047.07	- 1030.24
Aug.	56875.72	45833.18	11042.54
	TOTAL: 1/78-8/78		+ $4,186.28

Stipulation of Facts

CITY OF MISHAWAKA, INDIANA

Logan St. Delivery Point

August, 1976 through August, 1978

Month	*A* Wholesale	*B* Retail	*C* Difference (A-B)
1976			
Aug.	$80572.94	$59653.19	$20919.75
Sept.	76392.93	54949.85	21443.08
Oct.	59868.84	47579.91	12288.93
Nov.	62817.50	51589.77	11227.78
Dec.	72034.64	52901.24	19133.40
	TOTAL: 8/76-12/76		+ $85,012.89
1977			
Jan.	$ 81146.99	$57910.58	$23236.41
Feb.	69303.98	67706.17	1597.81
Mar.	64250.83	67525.23	- 3274.40
April	64922.28	59597.27	5325.01
May	85694.98	69474.83	16220.15
June	88189.65	76318.25	11871.40
July	106726.45	90675.02	16051.43
Aug.	87067.88	72936.54	14131.34
Sept.	95266.01	74663.59	20602.42
Oct.	72570.37	70372.35	2198.02
Nov.	74674.19	71021.77	3652.42
Dec.	79471.36	77502.96	1968.40
	TOTAL: 1977		+ $113,580.41
1978			
Jan.	$ 80218.91	$81140.99	$- 922.08
Feb.	74431.87	75627.39	- 1195.52
Mar.	71251.02	71766.12	- 515.10
April	80239.29	76507.44	3731.85
May	71803.38	77172.36	- 5368.98
June	81027.42	82100.63	- 1073.21
July	100881.87	93522.21	7359.66
Aug.	106445.67	79818.11	26627.56
	TOTAL: 1/78-8/78		+ $28,644.18

Stipulation of Facts

CITY OF MISHAWAKA, INDIANA

Russ Delivery Point

August, 1976 through August, 1978

	A	*B*	*C*
Month	*Wholesale*	*Retail*	*Difference (A-B)*
1976			
Aug.	$83406.34	$65469.40	$17936.94
Sept.	79479.93	58902.73	20577.20
Oct.	69335.75	51318.40	18017.35
Nov.	62760.98	50871.24	11889.74
Dec.	72997.79	51798.25	21199.54
	TOTAL: 8/76-12/76		+ $89,620.77
1977			
Jan.	$80669.12	$57046.92	$23622.20
Feb.	71357.49	69216.51	2140.98
Mar.	65936.64	68575.39	- 2638.75
April	66667.90	62173.94	4493.96
May	78738.47	68133.13	10605.34
June	80111.92	73541.34	6570.58
July	86087.45	76822.74	9264.71
Aug.	80818.87	70926.94	9891.93
Sept.	78697.79	67164.91	11532.88
Oct.	67111.77	65590.84	1520.93
Nov.	68671.68	65748.49	2923.19
Dec.	71497.60	71634.73	- 137.13
	TOTAL: 1977		+ $79,790.82
1978			
Jan.	$71678.54	$73933.06	$- 2254.52
Feb.	69231.77	70988.84	- 1757.07
Mar.	66605.94	67975.48	- 1369.54
April	74585.90	72297.29	2288.61
May	66975.70	73058.08	- 6082.38
June	65259.00	74551.40	- 9292.40
July	74085.94	77081.86	- 2995.92
Aug.	80930.70	67931.41	12999.29
	TOTAL: 1/78-8/78		- $8,463.93

Stipulation of Facts

CITY OF MISHAWAKA, INDIANA

12th Street Delivery Point

August, 1976 through August, 1978

Month	*A* *Wholesale*	*B* *Retail*	*C* *Difference (A-B)*
1976			
Aug.	$57347.34	$44816.35	$12530.99
Sept.	56155.82	41220.02	14935.80
Oct.	48748.05	37097.08	11650.97
Nov.	50771.06	41478.50	9292.56
Dec.	61536.66	43327.15	18209.51
	TOTAL: 8/76-12/76		+ $66,619.83
1977			
Jan.	$69141.32	$48780.42	$20360.90
Feb.	60871.28	57706.76	3164.52
Mar.	53296.00	54586.47	- 1290.47
April	51794.32	47297.15	4497.17
May	64302.21	54295.33	10006.88
June	65864.96	58158.94	7706.02
July	85456.77	69299.57	16157.20
Aug.	68575.69	58435.17	10140.52
Sept.	73269.31	58418.20	14851.11
Oct.	59936.16	58298.46	1637.70
Nov.	62909.56	59449.58	3459.98
Dec.	73482.66	69066.82	4415.84
	TOTAL: 1977		+ $95.107.37
1978			
Jan.	$79984.45	$76476.22	$ 3508.23
Feb.	75315.28	72564.14	2751.14
Mar.	66391.72	69934.79	- 3543.07
April	73049.68	71060.76	1988.92
May	63140.71	71265.82	- 8125.11
June	70134.23	72490.28	- 2356.05
July	84888.02	80835.63	4052.39
Aug.	88193.26	69593.06	18600.20
	TOTAL: 1/78-8/78		+ $16,876.65

Stipulation of Facts

CITY OF MISHAWAKA, INDIANA

Virgil Delivery Point

August, 1976 through August, 1978

	A	*B*	*C*
Month	*Wholesale*	*Retail*	*Difference (A-B)*
1976			
Aug.	$63694.05	$48871.68	$14822.37
Sept.	62070.72	44390.36	17680.36
Oct.	49969.69	40322.97	9646.72
Nov.	53112.97	44152.59	8960.38
Dec.	60564.68	45830.00	14734.68
	TOTAL: 8/76-12/76		+ $65,844.51
1977			
Jan.	$70747.80	$51272.46	$19475.34
Feb.	62619.28	60684.73	1934.55
Mar.	55689.05	58830.94	- 3141.89
April	53767.86	51518.69	2249.17
May	70726.71	59079.59	11647.12
June	73270.04	65710.50	7559.54
July	90290.04	77657.23	12632.81
Aug.	74818.81	62837.48	11981.33
Sept.	80273.08	63285.45	16987.63
Oct.	60513.31	59131.21	1382.10
Nov.	61575.91	58362.85	3213.06
Dec.	67268.53	65798.08	1470.45
	TOTAL: 1977		+ $87,391.21
1978			
Jan.	$69297.86	$70626.41	$- 1328.55
Feb.	63439.26	65045.50	- 1606.24
Mar.	60154.31	61709.77	- 1555.46
April	66025.30	63182.00	2843.30
May	59020.80	62949.17	- 3928.37
June	63137.64	66501.89	- 3364.25
July	80092.90	76167.54	3925.36
Aug.	86330.58	65274.78	21055.80
	TOTAL: 1/78-8/78		+ $16,041.59

TOWN OF NEW CARLISLE, INDIANA

August, 1976 through August, 1978

	A	*B*	*C*
Month	*Wholesale*	*Retail*	*Difference (A-B)*
1976			
Aug.	$14048.50	$11206.56	$ 2841.94
Sept.	13765.00	10652.86	3112.14
Oct.	11789.76	9365.97	2423.79
Nov.	12446.89	9540.02	2906.87
Dec.	15648.11	10594.08	5054.03
	TOTAL: 8/76-12/76		+ $16,338.77
1977			
Jan.	$16834.13	$12202.56	$ 4631.57
Feb.	14777.20	13962.56	814.64
Mar.	12123.64	12263.38	- 139.74
April	11984.94	11750.65	234.29
May	13831.64	12693.77	1137.87
June	14538.62	13502.24	1036.38
July	18760.02	17336.10	1423.92
Aug.	16074.13	13724.55	2349.58
Sept.	17995.75	15535.59	2460.16
Oct.	13904.42	13664.05	240.37
Nov.	15559.94	14385.80	1174.14
Dec.	17879.21	16951.70	927.51
	TOTAL: 1977		+ $16,290.69
1978			
Jan.	$17797.71	$17353.43	$ 444.28
Feb.	16123.57	15796.47	327.10
Mar.	13975.12	14304.30	- 329.18
April	16081.43	15536.01	545.42
May	12913.80	13782.82	- 869.02
June	14598.81	16117.95	- 1519.14
July	16845.29	16766.22	79.07
Aug.	18676.31	15381.81	3294.50
	TOTAL: 1/78-8/78		+ $1,973.03

Stipulation of Facts

CITY OF NILES, MICHIGAN

August, 1976 through August, 1978

	A	*B*	*C*
Month	*Wholesale*	*Retail*	*Difference (A-B)*
1976			
Aug.	$198147.84	$134873.55	$63274.29
Sept.	189057.72	121270.08	67787.64
Oct.	164166.35	148048.57	16117.78
Nov.	167453.09	140946.43	26506.66
Dec.	200890.15	170755.09	30135.06
	TOTAL: 8/76-12/76		+ $203,821.43
1977			
Jan.	$234347.38	$164853.89	$69493.49
Feb.	197040.40	171124.93	25915.47
Mar.	163682.93	157963.69	5719.24
April	175331.51	192850.89	–17519.38
May	199789.35	191687.43	8101.92
June	213957.98	138712.23	75245.75
July	249633.48	166238.89	83394.59
Aug.	215542.06	158712.25	56829.81
Sept.	231570.04	197701.59	33868.45
Oct.	176690.12	142014.09	34676.03
Nov.	192548.18	156619.91	35928.27
Dec.	213476.53	172355.54	41120.99
	TOTAL: 1977		+ $452,774.63
1978			
Jan.	$216320.08	$213331.66	$ 2988.42
Feb.	206598.12	198748.53	7849.59
Mar.	178016.49	145865.57	32150.92
April	194473.46	156090.49	38382.97
May	177320.46	159516.78	17803.68
June	202989.96	208261.38	– 5271.42
July	229907.64	204529.21	25378.43
Aug.	249396.00	214447.89	34948.11
	TOTAL: 1/78-8/78		+ $154,230.71

TOWN OF WARREN, INDIANA

August, 1976 through August, 1978

Month	*A* *Wholesale*	*B* *Retail*	*C* *Difference (A-B)*
1976			
Aug.	$18898.01	$15129.43	$ 3768.58
Sept.	21088.44	16862.75	4225.69
Oct.	20149.07	15755.26	4393.81
Nov.	21418.96	16428.59	4990.37
Dec.	25491.12	18153.77	7337.35
	TOTAL: 8/76-12/76		+ $24,715.80
1977			
Jan.	$31161.72	$22195.20	$ 8966.52
Feb.	26134.79	24683.01	1451.78
Mar.	20471.82	19671.06	800.76
April	20229.30	18062.39	2166.91
May	20914.05	18850.53	2063.52
June	21133.52	19405.35	1728.17
July	24857.98	22859.43	1998.55
Aug.	21921.40	18608.68	3312.72
Sept.	26930.03	22955.35	3974.68
Oct.	21683.93	19651.72	2032.21
Nov.	23927.38	21527.60	2399.78
Dec.	27502.07	26270.62	1231.45
	TOTAL: 1977		+ $32,127.05
1978			
Jan.	$30865.24	$29923.66	$ 941.58
Feb.	27179.14	26371.09	808.05
Mar.	21873.63	22982.24	- 1108.61
April	24290.26	23923.94	366.32
May	19618.57	21468.90	- 1850.33
June	19495.89	22385.60	- 2889.71
July	24158.96	24543.59	- 384.63
Aug.	25524.42	21299.20	4225.22
	TOTAL: 1/78-8/78		+ $ 107.89

54. The following table reflects, for each plaintiff, for the period commencing August 1976 to and including August 1978, the total difference between the actual wholesale rates paid subject to refund and the retail rates which were in effect and had been approved, at a level lower than proposed by I&M in its filings, by the Indiana and Michigan commissions, as compared in the tables within Stipulated Fact No. 53, the positive numbers representing any excess of the wholesale rate over the retail rate:

Avilla	$ + 16,805.50
Bluffton	+ 645,718.65
Columbia City	+ 644,910.31
Frankton	+ 81,275.38
Garrett	+ 211,896.82
Gas City	+ 203,895.42
Mishawaka	+1,342,509.89
New Carlisle	+ 34,602.49
Niles	+ 810,826.77
Warren	+ 56,950.74
Total	$ +4,049,461.97

55. During the period August 1976 to and including August 1978, I&M's actual billings, subject to refund, to plaintiffs as a group totalled $34,820,422.74. The $4,049,461.97 total differential as reflected in Stipulated Fact No. 54 represents 11.62% of I&M's total billings to all ten plaintiffs during that twenty-five (25) month period.

56. For the period commencing January 1973 to date, all of the comparative billing analyses that will be offered in evidence will utilize the following retail tariffs of I&M, either as filed by I&M or as reduced by the Indiana and Michigan commissions and in effect: Capacity Power ("C.P."), Industrial Power ("I.P.") and Quantity Power ("Q.P.") for the Indiana tariffs, and Large Power

("L.P.") for the only Michigan tariff applied. Tariff C.P. is applied in the comparative billing computations for Frankton; Tariff I.P. is applied in the comparative billing computations for Bluffton at its Horton Street delivery point, and for Columbia City; Tariff Q.P. is applied in the comparative billing computations for Avilla, Bluffton at its State Road delivery point, Garrett, Gas City, Mishawaka, New Carlisle and Warren. Tariff L.P. is applied in the comparative billing computations for Niles, the sole Michigan municipal plaintiff.

57. On November 14, 1977, I&M filed a petition for a rate increase in its Michigan jurisdiction with the Michigan Commission (Case No. E-5608).

58. On January 30, 1978, I&M filed a petition for a rate increase in its Indiana jurisdiction with the Indiana Commission (Cause No. 35251). On September 21, 1978, the Indiana Commission issued an Order in Cause No. 35251 and Trial Exhibit D-74 is a true and complete copy thereof. New retail tariffs, as a result of that Order, became effective on September 22, 1978.

59. On May 17, 1978, I&M filed with the Federal Commission proposed wholesale rate increases affecting the rates charged to each of the plaintiffs herein (Docket No. ER78-382).

60. On September 23, 1973, Robert M. Kopper, Executive Vice President of I&M, wrote a letter to the Mayor of the City of Mishawaka. On July 14, 1975, Mr. Kopper wrote a letter to the President of the Board of Trustees of Frankton. On September 9, 1975, Mr. Kopper wrote letters to each of the other plaintiffs.

61. On November 14, 1975, Robert M. Kopper wrote letters to each of the plaintiffs enclosing a copy of a letter

dated November 10, 1975, signed by George V. Patterson, President and Chief Operating Officer of Service Corporation.

62. On November 18, 1975, Robert M. Kopper testified before the FPC in FPC Docket No. E-9329.

63. In November, 1975, an article appeared in the *Business Week Magazine* issue of November 13, 1975.

64. In the Annual Report of AEP for 1975 there was a discussion entitled "Wholesale Sales Are Examined".

65. Plaintiffs filed a complaint against AEP, Service Corporation and I&M on January 30, 1976, before the Federal Commission, FPC Docket No. E-9548, and filed a complaint against I&M only in the United States District Court for the Northern District of Indiana on December 18, 1975 (Civil Action No. S 75-210).

66. In August, 1976, Mayor Margaret H. Prickett of Mishawaka wrote a letter to Jack F. Stark.

67. On September 7, 1976, Jack F. Stark, Executive Vice President of I&M, wrote letters to each of the plaintiffs. Trial Exhibits D-87 through D-100 are true and complete copies of those letters.

68. In September, 1976, Mayor Margaret H. Prickett of Mishawaka wrote a letter to Jack F. Stark. No other plaintiff in these consolidated actions sent any letter responding to Mr. Stark's letter of September 7, 1976.

69. On February 16, 1977, Mayor William Fryback of the City of Bluffton testified before the Federal Commission (FPC Docket No. E-9548). Trial Exhibit D-291 is a true and complete copy of that testimony.

Stipulation of Facts

70. On February 16, 1977, R. Wyatt Mick, Jr. of the City of Mishawaka testified before the FPC (FPC Docket No. E-9548). Trial Exhibit D-456 is a true and complete copy of that testimony.

71. On February 16, 1977, S.A. Brett of the City of Niles testified before the FPC (FPC Docket No. E-9548). Trial Exhibit D-513 is a true and complete copy of that testimony.

72. On May 10, 1977, Administrative Law Judge Samuel Kanell issued an Initial Decision in the FPC proceeding (FPC Docket E-9548). Trial Exhibit D-106 is a true and complete copy of that Initial Decision. Defendants filed with the Federal Commission exceptions to the Initial Decision.

73. I&M has not terminated or in any way interrupted its deliveries of bulk power to any plaintiff or to any member of I&M's class of municipal wholesale for resale customers.

74. On May 28, 1976, I&M filed with the Federal Commission an unsigned form of service agreement for the City of Mishawaka. Trial Exhibit D-109 is a true and complete copy of that filing (FPC Docket ER76-792).

75. On August 10, 1976, the plaintiff Mishawaka filed a petition to intervene in that proceeding.

76. On January 7, 1977, I&M filed a revised form of agreement for Mishawaka which was executed by an officer of I&M. Trial Exhibit D-110 is a true and complete copy of that filing.

77. On May 4, 1978, Administrative Law Judge Sherman P. Kimball issued an Initial Decision in that proceed-

ing. I&M has filed with the Federal Commission exceptions to the Initial Decision.

78. In its May 17, 1978 filing for a rate increase before the Federal Commission, I&M filed, as part of the revisions to its FPC Electric Tariff WS, revised forms of service agreements for its municipal wholesale for resale customers, both total requirements customers and partial requirements customers. True and complete copies thereof are contained in Trial Exhibit D-66A-F. No plaintiff has offered to enter into such form of service agreement.

79. Except as noted hereafter, each of the plaintiffs has an ordinance or other statute, regulation, rule, written or unwritten policy or order requiring that all persons inside its corporate limits purchase electricity from its electric utility system. Neither New Carlisle nor Niles imposes such requirements and Gas City and Mishawaka, while imposing such requirements, permit certain individual customers within their corporate limits to be served by I&M.

80. No plaintiff is or has been a member of any bulk power supply coordinating group.

81. Except for Niles, no plaintiff has any plans, tentative or firm, to expand, enlarge, purchase or add to present generation or transmission facilities. Niles is considering the possible addition of a second transmission loop.

82. Except as noted hereafter, no plaintiff has any plans, tentative or firm, to expand the areas served by its electrical distribution system. Bluffton, Gas City and Warren plan to do so only in connection with annexation or development and Mishawaka has a tentative general policy of expansion of its service area.

83. No plaintiff has any plan, tentative or firm, to expand, enlarge or add to present interconnections with any other utility.

84. In the period since 1968, electric customers in Bluffton, Gas City, Mishawaka and Niles, without physical change of location, changed from electric service by another utility or supplier to electric service by these municipalities. No other customers in other plaintiff municipalities made such a change.

85. In the period since 1968, customers in Bluffton and Mishawaka, without physical change of location, changed from electric service by these municipalities to electric service by another utility or supplier. No other customers in other plaintiff municipalities made such a change.

86. No plaintiff knows of any commercial or industrial customers served by plaintiffs who have expanded their physical facilities or their electric demand in an area outside of the service area of each respective plaintiff's electric utility as a result of each respective plaintiff's electric rates.

87. Except as noted hereafter, each plaintiff receiving a refund as a result of the settlement approved by the Federal Commission in the matter entitled *Indiana & Michigan Electric Company* (Docket No. E-7740) deposited the refund into its electric utility's operating balance and did not pass the refund on to its customers. Mishawaka's utility gave $900,000 to the City as a "payment in lieu of taxes" and a "reasonable return on investment." Niles deducted from its refund the cost of litigation and passed the balance on to its customers.

TOWN OF AVILLA

88. The Town of Avilla is a municipality located in the State of Indiana, with a population of approximately 1040. Avilla is governed by an elected Board of Trustees which is headed by a President. A full time municipal employee has responsibility to oversee the maintenance and operation of Avilla's electric utility as well as its sewer and water utilities. He reports to the Town Board.

89. Avilla has no electric generation capability of its own. The areas immediately surrounding Avilla are served on the north by Noble County REMC; on the east by I&M; on the south by Noble County REMC; and on the west by both I&M and Noble County REMC.

90. In accordance with the requirements of the Public Service Commission of Indiana, Avilla files Annual Reports of the operation of its electric utility with PSCI. True and complete copies of the Annual Reports of Avilla to PSCI for each of the years 1968 through 1977 are annexed as Trial Exhibits D-230 through D-239.

91. In accordance with the requirements of Indiana law, the Indiana State Board of Accounts audits the operations of electric utilities on a periodic basis. True and complete copies of the State Board of Accounts Field Examiner's Reports of Examination of the Electric Utility of the Town of Avilla for the periods January 1, 1968 through December 31, 1969; January 1, 1970 through March 29, 1971; March 30, 1971 through December 31, 1971; January 1, 1972 through December 3, 1974; and January 1, 1975 through December 31, 1976 are annexed as Trial Exhibits D-240 through D-244.

92. In accordance with the requirements of Indiana law, Avilla files a financial report for each calendar year with the Indiana State Board of Accounts.

93. As of September 1978, Avilla's electric utility had 475 customers, of which two were classified industrial customers, 51 were classified as commercial customers, two were classified school rate customers, and 20 were classified as town meters.

94. Since 1968, to the knowledge of Town officials, Avilla has lost no industrial customers and has gained one such customer. Wendell Beck, former President of the Avilla Board of Trustees, stated that Garrett Flexible Products, Inc., a company based in the City of Garrett, has expanded to available facilities in Avilla. The reason for the expansion is that "they [Garrett Flexible Products, Inc.] have outgrown their space. They can't expand where they're located."

95. Since 1968, to the knowledge of Town officials, no industrial customer has considered locating in Avilla and elected not to do so because of Avilla's electric rates. Since 1968, to the knowledge of Town officials, no industrial customer has decided not to expand its facilities within Avilla due to Avilla's electric rates.

96. Avilla had one prospective industrial customer approach the Town in the late 1960's, which could not locate there. The Penn Central R.R. refused to grant an easement over its track, precluding access to the proposed site. For the same reason, Avilla also encountered difficulty in furnishing sewer and water service to the site. The prospective industrial customer ultimately located elsewhere.

97. Avilla's electric utility made transfers from the electric utility to the Town general fund of $10,377.83 in 1969 and of $10,000 in 1972. Loans were made by the electric utility to the general fund as follows:

Year	*From*	*To*	*Amount*
1968	Electric Cash Reserve	General Fund	$1,000
1968	Electric Depreciation Fund	General Fund	$1,000
1969	Electric Depreciation Fund	General Fund	$1,000
1969	Electric Operating Fund	General Fund	$1,500

In 1973, Light Depreciation bonds or certificates of deposits in the amount of $5,000 were cashed and transferred to the Light Operating Fund in order to pay operating expenses. Also in 1973, Light Depreciation bonds or certificates of deposit in the amount of $15,000 were cashed and applied to a Motor Vehicle and Highway Services contract. Additional Light Depreciation bonds or certificates of deposit were cashed in 1975 in order to bring the Light Operating Fund out of the red.

98. Free electric service was provided by the electric utility to various municipal departments. In 1975, the electric bill of the sewage utility in the amount of $1,390.85 was written off by the Board of Trustees. Electric utility funds were also used to purchase a fire truck for the Town in 1967. The State Board of Accounts Field Examiner's Report for the period January 1, 1975 to December 31, 1976 reflects that free utility service has been provided to certain town officials. A copy of that report has been designated as Trial Exhibit D-247.

99. Avilla has been a wholesale electric customer of I&M and its predecessors since 1922. Pursuant to an agreement dated May 19, 1958 between Avilla and I&M, Avilla agreed to purchase electric power and energy from I&M

and I&M agreed to supply electric power and energy to Avilla. A true and complete copy of that 1958 agreement, drafted by I&M, is designated as Trial Exhibit D-9. That agreement was superseded on May 13, 1968 when Avilla elected to be served by I&M pursuant to Tariff MRS. A true and complete copy of that 1968 agreement, drafted by I&M and approved by FPC, is annexed as Trial Exhibit D-10.

100. Avilla sought and obtained two rate increases between 1968 and 1978. The first was a general rate increase which became effective in October 1975. An "Accounting Report on Proposed Rate Increase" dated June 16, 1975 was prepared by H. J. Umbaugh & Associates in connection with that rate increase. The second rate increase was effective in July 1976 and was an emergency flow-through increase. An "Accounting Report on Emergency Interim Rate Increase" dated July 8, 1976 was prepared by H. J. Umbaugh & Associates in connection with that rate increase.

101. The following schedule, prepared on a calendar year basis, shows for the Town of Avilla for the period from 1969 through July, 1976, the difference between the actual wholesale rate billings rendered to Avilla as a wholesale customer and the billings which would have been rendered to Avilla on the "appropriate" retail rate providing Avilla with the lowest cost of purchased power; for the period from August, 1976 through December, 1977, the difference between the actual wholesale rate billings rendered to Avilla as a wholesale customer and the billings on I&M's proposed "appropriate" retail rate, which would provide Avilla with the lowest cost of purchased power; and for the calendar year 1978, the difference between the projected wholesale rate billings under the proposed wholesale rate

filed in FERC Docket No. ER78-382 and the projected retail billings, using the same projected billing parameters, as proposed by I&M in its retail rate filing with PSCI on January 30, 1978, all as set forth in the several comparative billing analysis Exhibits annexed to the "Request to Admit Facts and Interrogatory" served on Avilla:

Year	*Wholesale v. Retail Billing Differential*
1969	$ - 927.71
1970	- 1,353.93
1971	- 2,277.24
1972	- 6,771.70
1973	- 6,754.63
1974	- 6,508.68
1975	- 21,201.45
1976	- 22,642.31
1977	- 10,906.17
1978	- 32,854.10

102. The following schedule shows for the Town of Avilla, from August, 1968 through August, 1978, the difference between the actual wholesale rate billings rendered to Avilla as a wholesale customer and the billings which would have been rendered to Avilla on the actual "appropriate" retail rate then in effect providing Avilla with the lowest cost of purchased power, as set forth and described in defendants' answers to plaintiffs' interrogatories:

Period	*Wholesale v. Retail Billing Differential*
August, 1968-December, 1976	$ + 9,436.79
January-December, 1977	+ 10,830.90
January-August, 1978	- 3,462.19
Total	$ +$16,805.50

Stipulation of Facts

103. Section 35.19a of the FERC Regulations under the Federal Power Act provides that a public utility filing for a wholesale rate increase subject to refund must submit a monthly report to FERC showing for each month the revenues that would have been collected under the previous wholesale tariff and the revenues being collected under the new wholesale tariff subject to refund.

104. I&M filed for a wholesale rate increase which was given FPC Docket No. E-7740 and in accordance with that FERC regulation I&M filed that monthly report for each and every month during the period January 1973 through July 1976.

105. For the period January 1973 through July 1976 Avilla paid I&M $131.08 less pursant to the new wholesale tariff than under the previous wholesale tariff.

106. At various times I&M and Avilla have received technical assistance from each other. Neither I&M nor Avilla has declined to offer assistance to the other when requested.

107. I&M sent a letter dated October 21, 1974 to the President of the Town Board. A copy of that letter is designated as Trial Exhibit D-249. Wendell Beck, President of the Town Board, upon learning of that letter contacted I&M's service representative, Bill Nimmo, and inquired as to the impact and consequence of the letter. Mr. Beck was advised "not to worry about it". He reported this conversation to the other members of the Town Board.

108. Avilla joined with other nine plaintiffs in filing complaints against I&M, AEP and Service Corporation before the FPC in E 9548 and against I&M in this Court in S 75-210.

109. In 1968 and again in 1969 or 1970, the Avilla Chamber of Commerce contacted I&M to discuss the sale of the Avilla electric utility. In 1974, again at the suggestion of the Avilla Chamber of Commerce, Avilla considered the sale of its electric utility. However, the Board rejected the suggestion.

110. In 1977, Avilla again considered sale of its electric utility and solicited offers from I&M and the Noble County REMC. Consideration of the sale of the Avilla electric utility was initiated by representatives of the Town.

111. On August 1, 1977, Vivian Hockenbarger, Clerk-Treasurer of Avilla, wrote a letter to Phil Dickes of I&M soliciting an offer from I&M for the purchase of the Avilla electric utility. A copy of that letter is designated as Trial Exhibit D-255. A letter with an identical text was sent at about the same time by Vivian Hockenbarger to Noble County REMC. Wendell Beck, President of the Town Board of Trustees from January 1976 to June 1978, stated to representatives of Noble County REMC and to representatives of I&M that Avilla decided to sell its electric utility at this time because "we were not financially able to handle any emergency that might come along, or a major disaster, wind, tornado, ice storm, what-have-you, because of the depletion of the Fund, and also that we were no way capable or able to replace equipment." Mr. Beck stated that the poor financial condition of the electric utility existed prior to 1976.

112. On January 25, 1978, a letter was written from L. R. Brunke, I&M Division Manager, to Wendell Beck. A copy of that letter is designated as Trial Exhibit D-262.

113. On January 31, 1978, a letter was written from Wendell Beck to L. R. Brunke asking that I&M bid for pur-

chase of the Avilla electric utility. A copy of that letter is designated as Trial Exhibit D-263.

114. I&M representatives subsequently met with Avilla representatives. A handwritten memorandum was prepared on the notepad of J. F. Stark relating to that meeting. On June 22, 1978, J. F. Stark wrote a memorandum to L. R. Brunke with regard to the Avilla electric utility acquisition proposal.

CITY OF BLUFFTON

115. The City of Bluffton is a municipality located about 20 miles south of Fort Wayne, Indiana, with a population of approximately 10,000. Bluffton is governed by a Mayor and a Common Counsel composed of five members. Their duties include ultimate responsibility for the operation of the City, including its electric, water and sewage utilities, as well as the operation of the Civil City. Bluffton also has a Board of Public Works and Safety, and a Plan Commission.

116. Bluffton's electric utility is headed by the Superintendent of the Electric Department, a full-time municipal employee with responsibility for the day-to-day maintenance and operation of the municipality's electric utility, and the coordination of electric supply and demand. Bluffton's electricity utility presently employs approximately 16 persons.

117. In accordance with the requirements of the Public Service Commission of Indiana, Bluffton files Annual Reports of the operation of its electric utility with PSCI. True and complete copies of the Annual Reports of Bluffton to PSCI for each of the years from 1968 through 1977 are designated as Trial Exhibits D-267 through D-276.

118. In accordance with the requirements of Indiana law, the Indiana State Board of Accounts audits the operations of electric utilities on a periodic basis. True and complete copies of the State Board of Accounts Field Examiner's Reports of Examination of the Electric Utility of City of Bluffton for the periods January 1, 1967 through December 31, 1968; January 1, 1969 through December 31, 1971; January 1, 1972 through February 15, 1974; and February 16, 1974 through December 31, 1975 are designated as Trial Exhibits D-277 through D-280.

119. In accordance with the requirements of Indiana law, the City of Bluffton files a financial report with the Indiana State Board of Accounts for each calendar year.

120. Pursuant to Indiana statutory authority, Bluffton owns and operates an electric utility. From its inception in about 1896 until 1959, Bluffton's electric utility generated all of the electric power requirements of its customers. In 1959 Bluffton first purchased power from I & M to supplement its own generation capability. Thereafter, the percentage of Bluffton's total electric power requirements purchased from I & M has increased. Bluffton now purchases approximately 95% of its electric power requirements from I & M.

121. Bluffton's present electric generation facility is used to "shave" its peak demands. Prior to 1974 Bluffton was supplied through one substation. From 1974 to the present it has been supplied with electricity by I & M through two substations, both of which are owned by Bluffton.

122. As of year-end 1977, Bluffton's electric utility had 15 "power" or industrial customers, 398 commercial customers and 3,532 residential customers.

123. Since 1968, to the knowledge of Bluffton's officials, the City has gained nine and lost five commercial or industrial customers. Bluffton is unable to identify any commercial or industrial customer which has ceased doing business or moved out of Bluffton due to electric rates. Since 1968, no industrial customer has been identified that has considered locating in Bluffton and elected not to do so because of Bluffton's electric rates. Since 1968, no industrial customer has been identified that has decided not to expand its facilities within Bluffton due to Bluffton's electric rates.

124. In the period between 1968 and 1977, Bluffton's electric utility has transferred funds at various times from the electric utility to the general fund of the City to finance various non-electric utility operations of the municipality. The following schedule shows for each year the amount of funds transferred directly from the electric utility to the general fund and loaned to the water utility:

Year	*Direct Transfers from Electric Utility to Bluffton's General Fund*	*Loan by Electric Utility to Bluffton's Water Utility*
1968	$ 35,000.00	$ .00
1969	35,000.00	.00
1970	35,000.00	.00
1971	235,000.00	.00
1972	35,000.00	.00
1973	35,000.00	13,000.00
1974	35,000.00	.00
1975	50,000.00	.00
1976	50,000.00	.00
1977	58,000.00	.00
TOTAL	$603,000.00	$13,000.00

Stipulation of Facts

125. The loan to the water utility was made and repaid in 1973.

126. Until 1975, Bluffton electric utility provided free electric street lighting to the City. In 1975, the electric utility began billing the City for this power and energy. However, transfers from the electric utility to the General Fund were increased by the amount of that billing.

127. Pursuant to an agreement dated December 17, 1957 between Bluffton and I & M, Bluffton agreed to purchase electric power and energy from I & M and I & M agreed to sell power and energy to Bluffton. A true and complete copy of the 1957 agreement, which was drafted by I & M, is designated as Trial Exhibit D-11. That agreement was superseded on May 14, 1968 when Bluffton elected to be served by I & M pursuant to Tariff MRS. A true and complete copy of the 1968 agreement, which was drafted by I & M and approved by the FPC, is designated as Trial Exhibit D-12.

128. Bluffton sought and obtained three rate increases in the period between 1968 and the present. They were in 1975, 1976 and 1978. The 1976 and 1978 increases were "pass-through" rate increases.

129. The following schedule, prepared on a calendar year basis, shows for the City of Bluffton, for the period from 1969 through July, 1976, the difference between the actual wholesale rate billings rendered to Bluffton as a wholesale customer and the billings which would have been rendered to Bluffton on the "appropriate" retail rate providing Bluffton with the lowest cost of purchased power; for the period from August, 1976 through December, 1977, the difference between the actual wholesale rate billings rendered to Bluffton as a wholesale customer and the billings

on I & M's proposed "appropriate" retail rate, which would provide Bluffton with the lowest cost of purchased power; and for the calendar year 1978, the difference between the projected wholesale rate billings under the proposed wholesale rate filed in FERC Docket No. ER78-382 and the projected retail billings, using the same projected billing parameters, as proposed by I & M in its retail rate filing with PSCI on January 30, 1978, all as set forth in the several comparative billing analysis Exhibits annexed to the "Request to Admit Facts and Interrogatory" served on Bluffton (Negative numbers indicate for those calendar years that Bluffton paid less on the wholesale rate; positive numbers indicate for those calendar years that Bluffton paid more as a wholesale customer):

Year	*Wholesale v. Retail Billing Differential*
1969	$ — 26,218.92
1970	— 28,825.45
1971	— 14,852.91
1972	— 41,234.35
1973	+ 55,978.77
1974	+ 59,538.49
1975	—126,442.91
1976	—145,728.98
1977	+ 50,495.30
1978	—171,886.16

130. The following schedule shows for the City of Bluffton from August, 1968 through August, 1978, the difference between the actual wholesale rate billings rendered to Bluffton as a wholesale customer and the billings which would have been rendered to Bluffton on the actual "appropriate" retail rate then in effect providing Bluffton with the lowest

cost of purchased power, as set forth and described in defendants' answers to plaintiffs interrogatories:

Period	*Wholesale v.Retail Billing Differential*
August, 1968-December, 1976	$ +213,671.36
January-December, 1977	+354,291.66
January-August, 1978	+ 77,755.63
Total	$ +645,718.65

131. I & M sent a letter dated September 9, 1975 to William Fryback, the Mayor of Bluffton. A true and complete copy of that letter is designated as Trial Exhibit D-281. Mayor Fryback testified in January 1977 that he had done nothing to seek alternate supplies of power.

132. Bluffton joined with nine other plaintiffs in filing complaints against I & M, AEP and Service Corporation before the FPC in E 9548 and against I & M in this Court in S 75-210.

CITY OF COLUMBIA CITY

133. The City of Columbia City is a municipality located in the State of Indiana, with a population of approximately 5,000.

134. Columbia City is governed by a Mayor, a Common Council, and a Board of Public Works and Safety.

135. The Superintendent, a full-time employee, has responsibility for the day-to-day maintenance and operation of the municipality's electric utility, but he reports to the Board of Public Works and Safety and to the Common Council which makes all the decisions on personnel and policy matters.

136. Columbia City has no electric generation of its own.

Stipulation of Facts

137. Northern Indiana Public Service Company and Whitley County Rural Electric Membership Corporation provide retail electric service to certain areas contiguous to the area in which the City of Columbia City provides retail electric service.

138. In accordance with the requirements of the Public Service Commission of Indiana, Columbia City files Annual Reports of the operations of its electric utility with PSCI. True and complete copies of the Annual Reports of Columbia City to PSCI for each of the years 1968 through 1977 are designated as Trial Exhibits D-324 through D-333.

139. In accordance with the requirements of Indiana law, the Indiana State Board of Accounts audits the operations of the electric utility on a periodic basis. True and complete copies of the State Board of Accounts Field Examiner's Reports of Examination of Municipal Electric Utility, Civil City of Columbia City, Whitley County, Indiana for the periods January 1, 1967 to December 31, 1968; January 1, 1969 to December 31, 1971, January 1, 1972 to December 31, 1973; and January 1, 1974 to December 31, 1976 are designated as Trial Exhibits D-319 through D-322.

140. In September 1977, Columbia City had approximately six acres of developed ground in the 16-acre industrial part, and that six-acre site was at that time the total area available within the City limits for the location of new industrial customers.

141. On June 26, 1978 the Chairman of the Economic Development Commission of the City of Columbia City and its Mayor received an inquiry from a prospective manufacturer of capacitors seeking financing for a new facility within Columbia City; the requested financing has not been forthcoming.

142. In the period between 1968 and 1973, Columbia City's electric utility "absorbed" at various times non-

electric utility expenses of the Civil City, and provided street lighting without charge to the City. The following schedule shows for each year the amount of funds so "absorbed" by the electric utility for other municipal departments:

Year	*Amounts "Absorbed" by Electric Utility of Civil City Expenses*
1968	$ 63,117.52
1969	70,033.67
1970	74,253.15
1971	77,763.66
1972	19,937.68
1973	43,145.89
Total	$348,251.57

143. Between January 1, 1972 and December 31, 1976, the electric utility of Columbia City made loans to other utility departments and to other agencies of the City government, which loans were for non-electric utility purposes. Such loans were made as shown on the following schedule:

Date	*Fund From Which Made*	*Fund To Which Made*	*Amount of Loan*
May 31, 1972	Electric Operating Fund	Water Operating Fund	$100,000.00
Dec. 31, 1973	Electric Operating Fund	Water Operating Fund	45,000.00
Dec. 23, 1975	Electric Operating Fund	Water Operating Fund	5,000.00
June 18, 1976	Electric Operating Fund	Bureau of Outdoor Recreation	18,000.00
		Total	$168,000.00

Stipulation of Facts

144. Pursuant to an agreement dated January 12, 1954 between Columbia City and I&M, Columbia City agreed to purchase electric power and energy from I&M and I&M agreed to sell electric power and energy to Columbia City. I&M has provided electric power and energy to Columbia City since 1947 and Columbia City has purchased all of its power and energy from I&M since 1954, when Columbia City ceased providing any part of its electric requirements through its own generation. A true and complete copy of the 1954 agreement has been designated as Trial Exhibit D-13A.

145. On May 14, 1968, Columbia City elected to be served by I&M pursuant to the rates and charges and terms and conditions of service contained in I&M's electric Tariff MRS. A true and complete copy of the 1968 agreement, which was drafted by I&M and approved by the FPC, has been designated as Trial Exhibit D-13B.

146. Columbia City received a rate change on September 16, 1966 and sought and obtained two rate increases in the period between 1968 and the present.

147. In May 1971 Columbia City implemented the fuel adjustment clause for the power rate and the SEH (School) rate. In October 1974 Columbia City implemented a fuel adjustment clause for all customers.

148. In 1976, Columbia City filed a petition for a general rate increase with the PSCI and, while the original petition was still pending, Columbia City filed for an emergency flow-through rate increase. The flow-through rate increase was granted in September 1976 and was implemented with the October 1976 billing; the general rate petition was approved by the PSCI in January 1977, and the first billing under this new rate was in March 1977.

Stipulation of Facts

149. From the period 1972 to date, the only cost of service study prepared for or by Columbia City was in connection with its 1976 rate increase filing.

150. The 1976 cost of service study was found by PSCI to support the rate increase request in all areas except the PSCI did not "support the varied treatment among the customers that were combined to make up the new proposed customer classifications." A true and complete copy of the 1976 cost of service study is designated as Trial Exhibit D-309.

151. Based upon facts admitted or deemed admitted by the City of Columbia City for the purposes of this litigation, the following schedule shows for the City of Columbia City, for each calendar year from 1969 through 1978, the difference between the actual wholesale rate billings rendered to Columbia City as a wholesale customer and the billings which would have been rendered to Columbia City on the "appropriate" retail rate providing Columbia City with the lowest cost of purchased power, and for the calendar year 1978, the difference between the projected wholesale rate billings under the proposed wholesale rate filed in FPC Docket No. ER78-382 and the projected retail billings, using the same projected billing parameters, as proposed by I&M in its retail rate filing with PSCI on January 30, 1978, all as set forth in the several comparative billing analysis Exhibits annexed to the "Request to Admit Facts and Interrogatory" served on Columbia City (Negative numbers indicate, for those calendar years, that Columbia City paid less on the wholesale rate; positive numbers indicate for those calendar years that Columbia City paid more as a wholesale customer):

Year	*Wholesale v. Retail Billing Differential*
1969	$ – 27,192.18
1970	– 5,533.32
1971	+ 2,373.03
1972	– 38,776.14
1973	+ 55,676.05
1974	+ 74,400.85
1975	– 38,778.87
1976	– 34,907.84
1977	+194,364.29
1978	– 30,346.80

152. The following schedule shows for the City of Columbia City from August, 1968 through August, 1978, the difference between the actual wholesale rate billings rendered to Columbia City as a wholesale customer and the billings which would have been rendered to Columbia City on the actual "appropriate" retail rate then in effect providing Columbia City with the lowest cost of purchased power, as set forth and described in defendants' answers to plaintiffs' interrogatories:

Period	*Wholesale v. Retail Billing Differential*
August, 1968-December, 1976	$ + 190,113.98
January-December, 1977	+ 327,215.37
January-August, 1978	+ 127,580.96
	$ + 644,910.31

153. At various times since 1968 Columbia City's electric utility received technical assistance from I&M, including an occasion in 1977 on which it lost one of its two transformers before dawn and requested, and received,

equipment and manpower from I&M to keep its electric system in operation. I&M billed Columbia City for this service and was paid. Even with the assistance received from I&M, Columbia City had to curtail electric deliveries to its large customers.

154. I&M sent a letter dated September 9, 1975 to the Mayor of Columbia City. A true and complete copy of that letter is designated as Trial Exhibit D-318.

155. Robert Walker, whose term commenced on January 1, 1976 as Mayor, learned about the September 9, 1975 letter from his predecessor but had no discussions with I&M with respect to the said letter. Mayor Walker could identify no discussion between any City representatives with representatives of I&M in which he was warned that Columbia City's contract would not be renewed or replaced by a subsequent contract.

156. Columbia City joined nine other plaintiffs in filing complaints against I&M, AEP and Service Corporation before the FPC in E-9548 and against I&M in this Court in S 75-210.

157. Mayor Walker had no personal contact with any representative of I&M with respect to Columbia City's claim that I&M would cut off service to Columbia City after July 18, 1979.

158. Mayor Walker could identify no contact made with him by any representative of I&M with respect to Columbia City's claim that I&M had threatened to cut off service to Columbia City after July 18, 1979.

159. Mayor Walker had no personal knowledge of the allegations contained in paragraph "12" of the Con-

solidated Complaint other than information provided by his attorneys.

160. On December 12, 1977, Mayor Robert Walker of Columbia City executed an affidavit in connection with the motion for a preliminary injunction in Civil Action No. S 77-0209 (Trial Exhibit D-307); Mayor Walker had no personal knowledge as to his statements about the rates at which defendant I&M sold bulk power to its large retail industrial customers other than information imparted to him by his attorney; he had no personal knowledge with respect to the rates of I&M as filed with FPC on June 13, 1972, other than that received from his attorney.

161. Mayor Walker had never seen and had no personal knowledge of any of the matters contained in the responses filed by Columbia City to defendants' First Set of Interrogatories of July 6, 1978 relating to the issue of price squeeze.

162. In 1969, Columbia City received from Schellie Associates, Inc. an "annexation study" which had been commissioned by the City Council of Columbia City (Trial Exhibit D-323). In that annexation study, it was reported that the only other electric utility which shares in the providing of electric service to residents in the "study area" were Whitley County Rural Electric Membership Corporation and Columbia City Electric Utility.

163. Since 1968, Columbia City has annexed additional area contiguous to its City limits and presently has under consideration a 200-acre parcel being considered for annexation in which Whitley County Rural Electric Membership Corporation presently provides electric service.

164. Columbia City continues to receive inquiries concerning location within the City from commercial and in-

dustrial establishments, including relocation to larger facilities, or new facilities, of existing customers of the Columbia City electric department.

TOWN OF FRANKTON

165. The Town of Frankton is a municipality located about 40 miles northeast of Indianapolis, Indiana, with a population of approximately 2,200. Frankton is governed by an elected Board of Trustees which is composed of three members and headed by a President. The position of trustee is part-time. The Board's duties include ultimate responsibility for the operation of the Town's electric, water and sewer utilities, as well as the civil Town.

166. Pursuant to Indiana statutory authority, Frankton has owned and operated a municipal electric utility since the early 1900's. At first it generated all its own electric power requirements. In the 1920's the Town shut down its generator and began purchasing all its electric power from a company that later merged into I&M. Frankton has no electric generation capability of its own; it is supplied with power and energy by I&M through a substation which is owned by I&M.

167. Frankton's electric utility is supervised and run by the Superintendent of Utilities, a full-time municipal employee wtih responsibility for the maintenance and operation of the Town's electric utility as well as its sewer and water utilities, and the maintenance of Frankton's streets.

168. In accordance wiht the requirements of the Public Service Commission of Indiana, Frankton files Annual Reports of the operation of its electric utility with PSCI. True and complete copies of the Annual Reports of Frank-

ton to PSCI for each of the years from 1968 through 1977 are designated as Trial Exhibits D-337 through D-346.

169. In accordance with the requirements of Indiana law, the Indiana State Board of Accounts audits the operations of electric utilites on a periodic basis. True and complete copies of the State Board of Accounts Field Examiner's Reports of Examination of the Electric Utility of the Town of Frankton for the periods January 1, 1968 through December 31, 1971; January 1, 1972 through December 31, 1973; and January 1, 1974 through February 29, 1976 (including Supplemental Reports to the earlier Reports) are designated as Trial Exhibits D-347 through D-349.

170. In accordance with the requirements of Indiana law, Frankton files an annual financial report with the State Board of Accounts.

171. As of year-end 1977, Frankton's electric utility had no industrial customers, approximately 85 commercial customers, 956 residential customers, and 5 "large power" customers.

172. Since 1968, Frankton has neither gained nor lost any industrial or "large power" customers. Frankton is unable to identify any industrial or "large power" customer which, since 1968, has considered locating in Frankton and elected not to do so because of Frankton's electric rates. Frankton is unable to identify any industrial or "large power" customer which, since 1968, has decided not to expand its facilities within Frankton due to Frankton's electric rates.

173. In the period between 1965 and 1971, Frankton's electric utility transferred funds from the electric utility to

the general fund of the Town to finance operations of the Town other than its electric utility. The following schedule shows for each year the amount of funds transferred directly from the electric utility to the general fund and the amount of funds loaned by the electric utility to other municipal departments:

Year	*Direct Transfers from Electric Utility to General Fund*	*Loans by Electric Utility to Other Municipal Operations*
1965	$ .00	$ 15,000.00
1966	5,000.00	.00
1967	5,000.00	.00
1968	8,000.00	.00
1969	10,000.00	.00
1970	6,000.00	.00
1971	7,000.00	.00
TOTAL	$ 41,000.00	$ 15,000.00

174. The 1965 loan was made on March 4, 1965 and repaid in full in March 1965.

175. During the period between January 1, 1968 and December 31, 1971, expenses of other Town departments were paid by the electric utility and were recorded as operating expenses of the electric utility.

176. In the Field Examiner's Report filed with the State Board of Account on July 20, 1972, a copy of which was transmitted to and discussed with the Board of Trustees, the Field Examiner reported:

"FINANCIAL CONDITION

In the last three (3) years of the audit period expenses exceeded revenue by an average of over

$12300.00 per year not including the Meter Deposit Fund.

If this trend continutes the financial resources of the Electric Utility will be exhausted before the end of 1972."

177. Certain funds were designated on the books of the electric utility for "depreciation" and "reserve". The following schedule shows for each year from 1968 through 1977 the balance in these accounts at year end:

Year Ended	*Depreciation*	*Reserve*
1967	$ 8,844.25	$5,000.00
1968	13,492.49	5,000.00
1969	9,571.67	5,000.00
1970	13,340.54	8,000.00
1971	15,081.20	1,000.00
1972	.00	.00
1973	.00	.00
1974	.00	.00
1975	.00	.00
1976	.00	.00
1977	.00	.00

178. In 1974, the Frankton Town Board retained H. J. Umbaugh & Associates to prepare an application for a rate increase. H. J. Umbaugh & Associates transmitted its "Accounting Report on Rates and Charges" dated November 1974 to the Board of Trustees. A copy of that report is designated as Trial Exhibit D-355. After receiving the report, the Board of Trustees advised all electric customers of a meeting to discuss the proposed rate increase, stating:

"We are charging much less for Electric service, principally for residential service, than other utilities are charging. Annual revenues are not sufficient to

pay the annual cash operating expenses. No funds are now providing for improvements to the system. The proposed increase in rates will bring us somewhat near what other Utilities are charging for Electric services, and will provide funds for meeting the cash requirements of the Utility and provide reasonable funds to improve the Electric Services to the Community."

179. In 1974, Frankton retained Robert E. Wills, a professional engineer, to study and report to the Town Board with respect to the Town's electric distribution system and to make recommendations for the improvement of its distribution system. The results of that study were transmitted to the Town Board on October 28, 1974 in a letter entitled "Electric Distribution System and Improvement Recommendations". A copy of that document is designated as Trial Exhibit D-354. Frankton's Superintendent of Utilities concurred with the findings and recommendations contained in the Wills' study.

180. In the period between October 1974 until at least August 1976, because of the lack of funds, the Town commenced no actual construction with respect to the recommendations in the Wills' study. As of October 1978, certain steps recommended, in 1974, to be completed in the "near future" were not completed and those steps recommended, in 1974, to be completed in 1977 and 1978 and after, although some have been started, have not all been completed. As of the end of 1977, the President of the Board of Trustees stated that the electric utility was in "serious need of repair" and that its "distribution system need[ed] to be rebuilt and strengthened in several areas of the Town and to enable the utility to handle larger electric demands in the future, if the Town is to grow."

Stipulation of Facts

181. Various trustees of the Town have expressed the view that before 1976 Frankton "had allowed" its electric utility equipment "to deteriorate through the absence of money to keep it in a good state of repair".

182. In January 1976 Mr. Closser, a Member of the Board of Trustees suggested, at a meeting of the Board, that the Town deny any new connections to the Town electric system until the system could be improved. No action was taken on that suggestion.

183. On April 26, 1976, H. J. Umbaugh & Associates, Frankton's rate consultants, wrote to the Town's Board of Trustees to explain the "difficulties with the finances of [Frankton's] municipal electric utility." A copy of this letter is designated as Trial Exhibit D-351.

184. The Frankton electric utility provides electric service to the municipal departments of the Town, including the police department, fire department, and electric department. These departments did not begin to pay for that service until August 1977.

185. Pursuant to an agreement dated April 10, 1962 between Frankton and I&M, Frankton agreed to purchase and I&M agreed to supply electric power and energy for Frankton. A true and complete copy of that agreement is designated as Trial Exhibit D-14A. That agreement was superseded on May 13, 1968 when Frankton elected to be served by I&M pursuant to Tariff MRS. A true and complete copy of that agreement, drafted by I&M and approved by the FPC, is designated as Trial Exhibit D-14B.

186. In 1969, Frankton sought and obtained a rate reduction yielding approximately $18,000 less in annual revenues to the electric utility. Frankton sought and obtained

two rate increases in the period between 1969 and the present. The first rate increase was filed on February 24, 1975 and the second increase was filed on December 22, 1976. A further "flow through" rate increase is being considered by the Town Board.

187. In the period from 1968 to date, no cost of service study or rate of return study was prepared by or for Frankton, either in connection with its rate increase or decrease filings or otherwise. Frankton's rates were restructured as a part of the 1975 rate increase and that restructured rate was approved by the Public Service Commission of Indiana.

188. The following schedule, prepared on a calendar year basis, shows for the Town of Frankton, for the period from 1969 through July, 1976, the difference between the actual wholesale rate billings rendered to Frankton as a wholesale customer and the billings which would have been rendered to Frankton on the "appropriate" retail rate providing Frankton with the lowest cost of purchased power; for the period from August, 1976 through December, 1977, the difference between the actual wholesale rate billings rendered to Frankton as a wholesale customer and the billings on I&M's proposed "appropriate" retail rate, which would provide Frankton with the lowest cost of purchased power; and for the calendar year 1978, the difference between the projected wholesale rate billings under the proposed wholesale rate filed in FERC Docket No. ER78-382 and the projected retail billings, using the same projected billing parameters, as proposed by I&M in its retail rate filing with PSCI on January 30, 1978, all as set forth in the several comparative billing analysis Exhibits annexed to the "Request to Admit Facts and Interrogatory" served on Frankton (Negative numbers indicate, for those

calendar years, that Frankton paid less on the wholesale rate; positive numbers indicate for those calendar years that Frankton paid more as a wholesale customer):

Year	*Wholesale v. Retail Billing Differential*
1969	$ — 15,656.01
1970	— 17,398.91
1971	+ 18,330.78
1972	— 32,800.54
1973	— 22,461.58
1974	— 20,491.09
1975	— 56,833.44
1976	— 54,756.87
1977	— 13,917.69
1978	— 66,185.17

189. The following schedule shows for the Town of Frankton from August, 1968 through August, 1978, the difference between the actual wholesale rate billings rendered to Frankton as a wholesale customer and the billings which would have been rendered to Frankton on the actual "appropriate" retail rate then in effect providing Frankton with the lowest cost of purchased power, as set forth and described in defendants' answers to plaintiffs' interrogatories:

Period	*Wholesale v. Retail Billing Differential*
August, 1968-December, 1976	$ + 31,329.63
January-December, 1977	+ 41,412.99
January-August, 1978	+ 8,532.76
Total	$ + 81,275.38

190. At various times the Frankton electric utility has received technical assistance from I&M and, at least since 1968, I&M has never declined to offer assistance when requested.

191. I&M sent a letter dated July 14, 1975 to the President of the Town Board. A copy of that letter is designated as Trial Exhibit D-359.

192. Frankton joined with nine other plaintiffs in filing complaints against I&M, AEP and Service Corporation before the FPC in Docket No. E-9548 and against I&M in this Court in S 75-210.

CITY OF GARRETT

193. The City of Garrett is a municipality located in the State of Indiana, with a population of approximately 4,700. Garrett is governed by a Mayor, Common Council and Board of Public Works and Safety. Its electric utility is headed by the Superintendent of Utilities, a full-time municipal employee who reports to the Board of Public Works and Safety and Common Council about all personnel and policy matters and who has responsibility for the maintenance and operation of the municipality's electric utility as well as its sewer and water utilities and the maintenance of Garrett's streets.

194. The City of Garrett has operated its own electric utility since 1896. The municipal electric utility began by generating all the City's electric power and energy. Since 1949, when all of Garrett's electric generation ceased, Garrett has purchased all of its electric power and energy from I&M. Garrett's energy and power is received via a single overhead line. The areas immediately surrounding Garrett are served on the west by Noble County REMC; on the

north by Northern Indiana Public Service Company; on the south and east by I&M; and on the east by the City of Auburn's municipal electric utility.

195. In accordance with the requirements of the Public Service Commission of Indiana, Garrett files Annual Reports of the operation of its electric utility with PSCI. True and complete copies of the Annual Reports of Garrett to PSCI for each of the years from 1968 through 1977 are designated as Trial Exhibits D-363 through D-372.

196. In accordance with the requirements of Indiana law, the Indiana State Board of Accounts audits the operation of electric utilities on a periodic basis. True and complete copies of the State Board of Accounts Field Examiner's Reports of Examination of the Electric Utility of City of Garrett for the periods January 1, 1967 through December 31, 1968; January 1, 1969 through December 31, 1971; January 1, 1972 through March 31, 1974; April 1, 1974 through December 31, 1974; and January 1, 1975 through December 31, 1975 are designated as Trial Exhibits D-373 through D-377.

197. In accordance with the requirements of Indiana law, Garrett files a financial report for each calendar year with the Indiana State Board of Accounts.

198. As of year-end 1977, Garrett's electric utility had 14 industrial ("power") customers, 130 commercial customers and 1,770 residential customers.

199. Since 1968, to the knowledge of present City officials, Garrett has neither gained nor lost any industrial customers. Since 1968, to the knowledge of present City officials, no industrial customer has considered locating in Garrett and elected not to do so because of Garrett's elec-

tric rates. Since 1968, to the knowledge of present City officials, no industrial customer has decided not to expand its facilities with Garrett due to Garrett's electric rates. According to Wendell Beck, President of Avilla's Town Board from January 1976 to June 1978, one industrial customer headquartered in Garrett, Garrett Flexible Products, Inc., has chosen to expand its operations outside of the area served by the Garrett electric utility by moving to the area served by Avilla's electric utility and is currently serviced by Avilla's electric utility.

200. In 1973, Garrett retained Campbell DeBoe Giese & Weber, a professional engineering firm, to study and report to the Common Council with respect to the electric transmission and distribution systems of Garrett, to review the existing facilities and to determine their adequacy for serving anticipated future electric loads. The results of that study were transmitted to the Common Council on May 18, 1973 in a report entitled "Study of the Electric Transmission and Distribution Systems, Municipal Electric Utility, City of Garrett, Indiana". A copy of that report is designated as Trial Exhibit D-378. The Common Council considered this engineering report at its July 17, 1973 meeting at which time it was advised by the engineering firm that its electric system was "below average and needs immediate attention" and that the recommended improvements would not produce additional revenues but would have to be financed through a request for a rate increase from PSCI.

201. In the period between May 1973 and November 1976, "while some of the minor circuit improvements" recommended in the May 1973 engineering report were accomplished, the City did not have the funds necessary to accomplish the remaining recommendations, including the construction of a substation.

Stipulation of Facts

202. By 1976, feeder circuits in the City were "getting overloaded" and needed relief and, according to Richard Burtch, a member of the Common Council and a member of the Board of Public Works and Safety, it was necessary to add to the Garrett electric utility's capacity.

203. In late 1976, Garrett applied to the United States Department of Commerce for funds in the amount of $495,000 for the construction of a new electric substation. In support of that application, the professional engineering firm of Campbell, DeBoe & Associates, Inc. was retained by the Common Council and reported the "Engineering Information in Support of Application for Funds for Proposed Power Supply Substation". A copy of this engineering report, dated November 1, 1976, which formed part of Garrett's application for these funds, is designated as Trial Exhibit D-379.

204. As of November 1976, Campbell, DeBoe & Associates, Inc. reported that

> "maximum system load [had] increased to 8200 kva and it [had] become necessary for the City to prohibit additional residential construction in the eastern fringe of the City. Similarly, industrial expansion [had] been discouraged because of the inability of the electrical system to provide adequate service in those outlying areas."

205. At the time of Garrett's application for funds to build a substation, Mayor Hoeffel wrote letters to various local residents and state and federal officials requesting assistance to secure approval of the funding application. A copy of one such letter is designated as Trial Exhibit D-385.

Stipulation of Facts

206. In the period between 1965 and 1977, Garrett's electric utility transferred funds at various times from the electric utility to the general fund of the City to finance various non-electric utility operations of the municipality. The following schedule shows for each year the amount of funds transferred directly from the electric utility to the general fund and the amount of funds loaned by the electric utility to other municipal departments:

Year	*Direct Transfers from Electric Utility to General Fund*	*Loans by Electric Utility to Other Municipal Operations*
1965	$ 70,600.00	.00
1966	60,000.00	.00
1967	85,564.68	.00
1968	91,250.00	.00
1969	106,000.00	.00
1970	105,125.00	.00
1971	108,500.00	$38,700.00
1972	110,000.00	.00
1973	118,275.00	.00
1974	55,000.00	.00
1975	.00	.00
1976	.00	16,000.00
1977	.00	18,494.70
TOTAL	$910,314.68	$73,194.70

207. In the period between 1967 and 1971, certain operating expenses paid by the electric utility included civil city expenses absorbed by the electric utility with no intention of reimbursement. Those items are identified in the State Audit Reports for the periods January 1, 1967 through December 31, 1968 and January 1, 1969 through December 31, 1971, which have been designated as Trial Exhibits D-373 and D-374.

Stipulation of Facts

208. The Garrett electric utility provides electric service to the municipal departments of the City, including the police department and fire department, and other services. According to Richard Burtch, a member of the Common Council and a member of the Board of Public Works and Safety, no payment is made by these other city departments to the electric utility for this power and energy.

209. Certain funds were reserved on the books of the electric utility as a provision for depreciation of Garrett's electric utility facilities. The following schedule show the amounts so reserved at year end for each year from 1967 to 1976:

Year	*Provision for Depreciation of Utility Facilities*
1967	$ 78,654.67
1968	88,356.54
1969	63,617.49
1970	49,955.09
1971	17,105.67
1972	15,395.14
1973	23,593.11
1974	45,783.00
1975	71,395.65
1976	93,634.91

210. Pursuant to an agreement dated October 13, 1959 between Garrett and I&M, Garrett agreed to purchase electric power and energy from I&M and I&M agreed to sell electric power and energy to Garrett. A true and complete copy of that 1959 agreement is annexed as Trial Exhibit D-15. That agreement was superseded on May 9, 1968 when Garrett elected to be served by I&M pursuant to Tariff MRS. A true and complete copy of that 1968 agreement,

drafted by I&M and approved by the FPC, is annexed as Trial Exhibit D-16.

211. Garrett sought and obtained two rate increases in the period between 1968 and the present. An "Accounting Report on Rate Increase" was transmitted to the Common Council on December 11, 1973 in connection with the first rate increase. The first rate increase, which was a general rate increase, was effective on May 24, 1974. The second rate increase was effective on November 1, 1976, was a "pass through" rate increase, and is still in effect.

212. In February 1978 Mayor Harris Hoeffel contacted various municipalities, including Kendallville and Butler, Indiana, and found Garrett's rates "very competitive".

213. The following schedule, prepared on a calendar year basis, shows for the City of Garrett, for the period from 1969 through July 1976, the difference between the actual wholesale rate billings rendered to Garrett as a wholesale customer and the billings which would have been rendered to Garrett on the "appropriate" retail rate providing Garrett with the lowest cost of purchased power; for the period from August, 1976 through December, 1977, the difference between the actual wholesale rate billings rendered to Garrett as a wholesale customer and the billings on I&M's proposed "appropriate" retail rate, which would provide Garrett with the lowest cost of purchased power; and for the calendar year 1978, the difference between the projected wholesale rate billings under the proposed wholesale rate filed in FERC Docket No. ER78-382 and the projected retail billings, using the same projected billing parameters, as proposed by I&M in its retail rate filing with PSCI on January 30, 1978, all as set forth in the several comparative billing analysis Exhibits annexed

to the "Request to Admit Facts and Interrogatory" served on Garrett (Negative numbers indicate, for those calendar years, that Garrett paid less on the wholesale rate):

Year	*Wholesale v. Retail Billing Differential*
1969	$ — 18,812.55
1970	— 20,858.00
1971	— 23,721.21
1972	— 50,925.89
1973	— 9,598.09
1974	— 4,103.00
1975	— 82,057.48
1976	— 87,899.47
1977	— 21,912.52
1978	—134,195.35

214. The following schedule shows for the City of Garrett from August 1968 through August 1978, the difference between the actual wholesale rate billings rendered to Garrett as a wholesale customer and the billings which would have been rendered to Garrett on the actual "appropriate" retail rate then in effect providing Garrett with the lowest cost of purchased power, as set forth and described in defendants' answers to plaintiffs' interrogatories:

Period	*Wholesale v. Retail Billing Differential*
August, 1968-December, 1976	$ + 85,239.15
January-December, 1977	+113,804.46
January-August, 1978	+ 12,853.21
TOTAL	$ +211,896.82

Stipulation of Facts

215. At various times the Garrett electric utility has received technical assistance from I&M. In August 1975, Charles Smith, then Superintendent of the Utility, recommended, and the Common Council approved, that I&M move certain electric poles at a cost of $2,550 "instead of having [the] City do [the] work." Mr. Smith reported that the City's cost for moving the poles would have been in excess of $5,000.

216. I&M sent a letter dated September 9, 1975 to the Mayor of Garrett. A true and complete copy of that letter is designated as Trial Exhibit D-384. Mayor Hoeffel knows of no steps taken by the City since he took office to explore alternative sources of power and energy.

217. Garrett joined with nine other plaintiffs in filing complaints against I&M, AEP and Service Corporation before the FPC in E-9548 and against I&M in this Court in S 75-210.

CITY OF GAS CITY

218. The City of Gas City is a municipality located in the State of Indiana four miles south of the City of Marion on U.S. Route #35. Gas City has a population of approximately 8,000. It is governed by a Mayor and a City Council. Their duties include the ultimate responsibility for the operation of the City, including the electric, water and sewer utilities, as well as the civil City.

219. Gas City also has a Planning Commission and a Board of Public Works.

220. In accordance with requirements of Indiana law, Gas City files a financial report for each calendar year with the Indiana State Board of Accounts.

Stipulation of Facts

221. Pursuant to Indiana statutory authority, Gas City owns and operates an electric utility. City records show that the electric utility began operation in 1898 when the City began purchasing all of its electric requirements from a predecessor of I & M. Gas City buys all of its power from I & M. Gas City has never had an electric generation facility of its own. Two companies, Glass Container Corporation and Owens-Illinois Glass Company, operate large industrial plants within the City. Those plants are served by I & M directly at I & M's retail industrial rates.

222. Gas City's Utilities Engineer, a full-time appointed official of the City, has responsibility for the maintenance and operation of the municipality's electric, water, and sewer utilities. That employee consults with and reports to the Mayor and the Council about municipal utility matters.

223. In accordance with the requirements of the Public Service Commission of Indiana, Gas City files Annual Reports of the operation of its electric utility with PSCI. Trial Exhibits D-402 through D-411 are true and complete copies of the Annual Reports of Gas City to PSCI for each of the years 1968 through 1977.

224. In accordance with the requirements of Indiana law, the Indiana State Board of Accounts audits the operations of the Gas City electric utility. Trial Exhibits D-412 through D-415 are true and complete copies of the three audit reports rendered from 1968 to date.

225. As of year end 1977, Gas City had no tariff designated as an industrial tariff and had no industrial customers.

Stipulation of Facts

226. Since 1968, the Gas City electric utility has had no industrial customers, as that term is used in paragraphs 10 and 11 of the consolidated complaint. Gas City has very little space for accommodating industrial development or commercial growth. Since 1968, Gas City is unable to identify any industrial customer which considered locating in Gas City and elected not to do so by reason of Gas City's electric rates. Since 1968, Gas City is unable to identify any commercial customer which decided not to expand its facilities within Gas City by reason of Gas City's electric rates. Since 1968, Gas City is unable to identify any commercial customer served by Gas City which has expanded its physical facilities or its electric demand in an area outside of the service area of the municipal utility by reason of Gas City's electric rates. Gas City's customer records are not arranged by class or by size of customer.

227. In 1973, Gas City retained McCullough & Associates, Certified Public Accountants, to prepare a report in anticipation of an application by the municipality for an increase in its electric rates to its customers. That study, "Rate and Financial Report", was submitted by the municipality to PSCI in connection with the municipality's application for a rate increase. Trial Exhibit D-390 is a true and complete copy of that report.

228. In 1976 Gas City filed a petition with PSCI for a rate increase (Cause #34624), and Trial Exhibit D-394 is a copy of an exhibit submitted to PSCI by Gas City in connection with that Cause.

229. Gas City has not sought any rate increase other than the 1974 and 1976 rate increases, except that Gas City has adopted an ordinance permitting an increase in its rates to electrical customers to become effective for the billing period commencing January 1, 1979, which will effect

a flow through of the increase in I & M's rate for purchased power to Gas City effective December 12, 1978.

230. In February, 1967, the engineering consulting firm of Campbell, DeBoe, Giese and Weber prepared for the City "A Study of the Municipal Electric System, City of Gas City, Indiana", and Trial Exhibit D-401 is a copy of that study.

231. In the period 1969 through 1977, the Gas City municipal electric utility has transferred funds at various times from the electric utility to the general fund of the City. The following schedule shows for each year the amount of funds transferred from the electric utility to the civil City:

Year	*Amount of Transfer*
1969	$25,177.00
1970	29,437.00
1971	34,800.00
1972	26,000.00
1973	22,000.00
1974	25,948.00
1975	21,400.00
1976	26,000.00

232. The Gas City municipal electric utility donates street lighting to the civil City and furnishes bulbs, poles, and maintenance for Gas City's street lighting system. In each of the years 1968 through 1974, Gas City reports the value of the electric utility's street lighting in its report to PSCI as $5,280. In each of the years 1975 through 1977, Gas City reported to PSCI that the value of the furnished street lighting was $21,618.96. The actual value of the electric services donated by the electric utility to the civil City

for street lighting is in excess of those figures in each of those years.

234. Approximately 99% of available residential lots in Gas City are built on. In the event of annexation it is contemplated that the land annexed will eventually be served by the City's electric utility. Gas City has no policy of encouraging the use of electricity by customers of its electric utility.

235. Gas City provides its residents with electric service, water service, sewage treatment, police and fire protection, streets, a municipal library, garbage collection and street lighting. A City official has testified that one consideration of the City in considering annexation is that people ought to be in Gas City as a part of its tax base if they are to receive substantial benefits from the City. At least since 1968, Gas City has had a policy of extending water, sewer, and/or fire protection to developments located outside the boundaries of the City only if it is feasible and the development agrees not to remonstrate against annexation when the City gets ready to annex the property. Gas City does serve an industrial park outside the City with police and fire protection.

236. At least since 1968, Gas City has had a policy of serving all residential and commercial customers located within the City's boundaries with electric service by its municipal utility.

237. From and including 1975 to date, the following residential developments have been annexed by Gas City: the Green Manor development (Section 6), the Northview development, the Southeast Plains development (Section 5), and the Colony Woods development. There are approximately 25 to 35 residential customers in the Green Manor

addition (Section 6). There are approximately 65 residential customers in the Northview Development. There are between 80 to 100 residential customers in the Southeast Plains Development (Section 5). All such residences are electrically heated. No residences have yet been built in the Colony Woods development, although 59 are planned.

238. The following schedule, prepared on a calendar year basis, shows for the City of Gas City, for the period from 1969 through July, 1976, the difference between the actual wholesale rate billings rendered to Gas City as a wholesale customer and the billings which would have been rendered to Gas City on the "appropriate" retail rate providing Gas City with the lowest cost of purchased power; for the period from August, 1976 through December, 1977, the difference between the actual wholesale rate billings rendered to Gas City as a wholesale customer and the billings on I&M's proposed "appropriate" retail rate, which would provide Gas City with the lowest cost of purchased power; and for the calendar year 1978, the difference between the projected wholesale rate billings under the proposed wholesale rate filed in FERC Docket No. ER78-382 and the projected retail billings, using the same projected billing parameters, as proposed by I&M in its retail rate filing with PSCI on January 30, 1978, all as set forth in the several comparative billing analysis Exhibits annexed to the "Request to Admit Facts and Interrogatory" served on Gas City (Negative numbers indicate, for those calendar years, that Gas City paid less on the wholesale rate):

Year	*Wholesale v. Retail Billing Differential*
1969	$ — 13,684.75
1970	— 22,103.45
1971	— 25,368.31
1972	— 48,280.24
1973	— 13,917.73
1974	— 12,377.18
1975	— 75,904.20
1976	— 68,510.40
1977	— 7,648.60
1978	—111,793.18

239. The following schedule shows for the City of Gas City from August, 1968 through August, 1978, the difference between the actual wholesale rate billings rendered to Gas City as a wholesale customer and the billings which would have been rendered to Gas City on the actual "appropriate" retail rate then in effect providing Gas City with the lowest cost of purchased power, as set forth and described in defendants' answers to plaintiffs interrogatories:

Period	*Wholesale v. Retail Billing Differential*
August, 1968-December, 1976	$ + 77,758.07
January-December, 1977	+110,658.96
January-August, 1978	+ 15,478.39
TOTAL	$ +203,895.42

240. I & M sent a letter dated September 9, 1975 to the Mayor of Gas City, a true and complete copy of which is designated as Trial Exhibit D-399. Gas City never communicated with any other electric utility (or group or associa-

tion of electric utilities) regarding the formation of, or participation in, a power pool or other similar coordination agreement. Gas City has not explored the availability of any alternative source of bulk power other than I & M.

241. Gas City joined with nine other plaintiffs in filing complaints against I & M, AEP and Service Corporation before the FPC in E 9548 and against I & M in this Court in S 75-210.

CITY OF MISHAWAKA

242. The City of Mishawaka is a municipality located in the State of Indiana, with a population of approximately 39,002. Mishawaka is governed by an elected Mayor and Common Council. Mishawaka's utility services are supervised and run by the General Manager, a full time municipal employee with responsibility for the maintenance and operation of the City's electric utility, as well as its water utility and waste water treatment plant, but subject to the direction of the Board of Public Works and Safety.

243. Mishawaka has no electric generation capability of its own. It is supplied with power and energy exclusively by I&M.

244. In accordance with the requirements of the Public Service Commission of Indiana, Mishawaka files Annual Reports of the operation of its Electric Utility with PSCI. True and complete copies of the Annual Reports of Mishawaka to PSCI for each of the years 1968 through 1977 are designated as Trial Exhibits D-428 through D-437.

245. In accordance with the requirements of Indiana law, the Indiana State Board of Accounts audits the opera-

tions of electric utilities on a periodic basis. True and complete copies of the State Board of Accounts Field Examiner's Report of Examination of Electric Utility of the City of Mishawaka for the periods January 1, 1967 through December 31, 1968; January 1, 1969 through December 31, 1971; January 1, 1972 through December 31, 1974; and January 1, 1975 through December 31, 1976 are designated as Trial Exhibits D-438 through D-441.

246. As of year-end 1977, Mishawaka's electric utility had 17,586 actual customers, of which 518 were industrial customers.

247. So far as is known by municipal officials, since 1968, no industrial customer has considered locating in Mishawaka and elected not to do so because of Mishawaka's electric rates or has decided not to expand its facilities within Mishawaka due to Mishawaka's electric rates.

248. During the period from January 15, 1973 to the present, Uniroyal, Inc. has operated an industrial plant at 407 North Main Street in the City of Mishawaka, Indiana. At all times during that period Uniroyal's plant has been a direct retail customer of I&M.

249. During the period from January 15, 1973 to the present, the Bendix Corporation has operated an industrial plant at 400 South Beiger Street in the City of Mishawaka, Indiana. At all times during that period the Bendix plant has been a direct retail customer of I&M.

250. During the period from January 15, 1973 to the present, Wheelabrator Corporation has operated an industrial plant at 400 South Byrkit Street in the City of Mishawaka, Indiana. At all times during that period Wheelabrator's plant has been a direct retail customer of I&M.

Stipulation of Facts

251. During the period from January 15, 1973 to the present, Dodge Manufacturing Corporation has operated an industrial plant at 500 South Union Street in the City of Mishawaka, Indiana. At all times during that period the Dodge plant has been a direct retail customer of I&M.

252. In the period between 1966 and 1977, Mishawaka's electrical utility transferred funds at various times from the electric utility to the general fund of the City and to other City utilities to finance various operations of the City not related to its electric utility. The following schedule shows for each year the amount of funds transferred directly from the electric utility to the general fund and the amount of funds loaned by the electric utility to other municipal departments:

Year	*Direct Transfers from Electric Utility to General Fund*	*Loans by Electric Utility to Other Municipal Operations or to Civil City*
1966	500,000	88,776.47
1967	500,000	234.29
1968	505,750	48,853.48
1969	500,000	00.00
1970	600,000	300,000.00
1971	600,000	18,000.00
1972	600,000	00.00
1973	600,000	00.00
1974	600,000	00.00
1975	600,000	00.00
1976	300,000	00.00
1977	900,000	00.00
Total	$6,805,750	$455,864.24

253. In the period between 1967 and 1977, Mishawaka's electric utility provided electric energy and power to the

municipality without charge. The following schedule shows for each year the amount of funds Mishawaka would have had to pay to the electric utility had it been required to pay for the electricity it received:

Year	*Services Contributed to Civil City by Electric Utility*
1967	53,944.71
1968	57,925.12
1969	79,593.77
1970	82,471.22
1971	86,246.34
1972	93,486.68
1973	99,336.49
1974	102,194.76
1975	111,481.96
1976	115,095.47
1977	213,334.85
Total	$1,095,109.40

254. In June 1977 pursuant to a settlement entered into between I&M and the City of Mishawaka, *et al.*, with regard to a rate increase filed by I&M with the then Federal Power Commission under its Docket No. E-7740, I&M paid to Mishawaka the sum of $930,605.29. By an order dated May 31, 1978, PSCI in Cause No. 33718 considered the propriety of the transfer of a portion of that refund to the Mishawaka Civil City. A copy of that Order is designated as Trial Exhibit D-444.

255. On March 6, 1978, Mishawaka filed a petition to increase its electric rates and charges with the PSCI which was given Cause No. 35284 and resulted in an order dated September 7, 1978. A copy of that Order is designated as Trial Exhibit D-442.

Stipulation of Facts

256. Pursuant to an agreement dated December 30, 1957 between Mishawaka and I&M, Mishawaka agreed to purchase electric power and energy from I&M and I&M agreed to sell electric power and energy to Mishawaka. A true and complete copy of that agreement is designated as Trial Exhibit D-19. That agreement was superseded by an agreement dated July 17, 1967 between I&M and Mishawaka. A true and complete copy of that agreement is designated as Trial Exhibit D-19A. That agreement was superseded on May 13, 1968, when Mishawaka elected to be served by I&M pursuant to Tariff MRS. A true and complete copy of that agreement, drafted by I&M and approved by the FPC, is annexed as Trial Exhibit D-20.

257. Mishawaka sought and obtained three rate increases in the period between 1968 and the present. On September 26, 1974, PSCI granted Mishawaka's petition for an emergency temporary rate increase. On July 26, 1976, PSCI granted to Mishawaka a second emergency temporary rate increase. Finally, on September 7, 1978, a third increase, this time a general rate increase, was granted by the PSCI. All of the rate increases mentioned above were across the board increases as to all classes of customers served by the Mishawaka Electric Utility.

258. In the period from 1968 to date, no cost of service study or rate of return study was prepared by or for Mishawaka, either in connection with its rate increase filings or otherwise.

259. In connection with the above-mentioned rate filings, Mishawaka made comparisons but prepared no written comparative rate studies for industrial or commercial customers with respect to neighboring communities and learned that its rates were comparatively lower.

Stipulation of Facts

260. The following schedule, prepared on a calendar year basis, shows for the City of Mishawaka, for the period from 1969 through July, 1976, the difference between the actual wholesale rate billings rendered to Mishawaka as a wholesale customer and the billings which would have been rendered to Mishawaka on the "appropriate" retail rate providing Mishawaka with the lowest cost of purchased power; for the period from August, 1976 through December, 1977, the difference between the actual wholesale rate billings rendered to Mishawaka as a wholesale customer and the billings of I&M's proposed "appropriate" retail rate which would provide Mishawaka with the lowest cost of purchased power; and for the calendar year 1978, the difference between the projected wholesale rate billings under the proposed wholesale rate filed in FERC Docket No. ER78-382 and the projected retail billings, using the same projected billing parameters, as proposed by I&M in its retail rate filing with PSCI on January 30, 1978, all as set forth in the several comparative billing analysis Exhibits annexed to the "Request to Admit Facts and Interrogatory" served on Mishawaka (Negative numbers indicate, for those calendar years, that Mishawaka paid less on the wholesale rate):

Year	*Wholesale v. Retail Billing Differential*
1969	$ — 72,325.56
1970	— 89,800.11
1971	—107,086.98
1972	—276,868.94
1973	—100,307.12
1974	—150,342.19
1975	—642,749.25
1976	—491,611.93
1977	— 47,407.19
1978	—652,832.17

Stipulation of Facts

261. The following schedule shows for the City of Mishawaka, from August, 1968 through August, 1978, the difference between the actual wholesale rate billings rendered to Mishawaka as a wholesale customer and the billings which would have been rendered to Mishawaka on the actual "appropriate" retail rate then in effect providing Mishawaka with the lowest cost of purchased power, as set forth and described in defendants' answers to plaintiffs' interrogatories:

Period	*Wholesale v. Retail Billing Differential*
August, 1968-December, 1976	$ +530,147.43
January-December, 1977	+697,536.95
January-August, 1978	+114,895.51
TOTAL	$ +1,342,579.89

262. At various times the Mishawaka Electric Utility has received technical assistance from I&M and I&M has never declined to offer assistance when requested.

263. I&M sent a letter dated September 24, 1973 to Margaret H. Prickett, Mayor of Mishawaka. A true and complete copy of that letter is designated as Trial Exhibit D-443.

264. Mishawaka joined with nine other plaintiffs in filing complaints against I&M, AEP and Service Corporation before the FPC in E-9548 and against I&M in this Court in S 75-210.

265. Clay Utilities is a privately owned water and sewer utility which operated in Clay Township near Mishawaka. For a portion of its service area (that lying east of Hickory Road) Clay Utilities purchased water from Mishawaka and

paid for the disposal of sewage through lines at Mishawaka city limits. Mishawaka attempted to extend its water and sewer services into an area being served by Clay Utilities but was halted by court decree. Prior to the litigation and during its pendency Mishawaka undertook to buy and finally did buy a portion of Clay Utilities in 1976 and presently serves all customers previously being served by Clay Utilities in Clay Township east of Hickory Road.

TOWN OF NEW CARLISLE

266. The Town of New Carlisle is a municipality located in the State of Indiana, with a population of approximately 1500.

267. New Carlisle is governed by a Town Board.

268. Its electric utility is headed by the Superintendent, a full-time municipal employee with responsibility for the maintenance and operation of the municipality's electric utility.

269. New Carlisle has no electric generation capability of its own; it is supplied with electricity and power by I&M via a single overhead line and has three 500 Kva transformers with a capacity of 1500 Kva.

270. In accordance with the requirements of the Public Service Commission of Indiana, New Carlisle files Annual Reports of the operation of its electric utility with PSCI. True and complete copies of the Annual Reports of New Carlisle to PSCI for each of the years 1968 through 1976 are designated as Trial Exhibits D-479 through D-487.

271. In accordance with the requirements of Indiana law, the Indiana State Board of Accounts audits the operations of the New Carlisle Municipal Electric Utility.

Stipulation of Facts

272. As of year-end 1977, New Carlisle's electric utility had no industrial customers, 75 commercial customers, and 525 residential customers.

273. Since 1968, New Carlisle has lost one industrial customer, Easy Heat Wirekraft Corporation on April 23, 1975.

274. Since 1968, so far as municipal officials are aware, no industrial customer has considered locating in New Carlisle and elected not to do so because of New Carlisle's electric rates.

275. Since 1968, so far as municipal officials are aware, no industrial customer has decided not to expand its facilities within New Carlisle due to New Carlisle's electric rates.

276. There are no commercial or industrial customers served by New Carlisle who have expanded their physical facilities or their electric demand in an area outside of the service area of the New Carlisle Municipal Electric Utility as a result of New Carlisle's electric rates.

277. In 1974, New Carlisle retained R. W. Beck and Associates, an analytical and consulting engineering firm, to study and report to the Board of Trustees with respect to the ability of the existing rates to meet projected revenue requirements through 1977. The result of that study was transmitted to the Board of Trustees on December 12, 1974 and was entitled "Electric Rate Study For New Carlisle Municipal Electric Utility, New Carlisle, Indiana". A copy of that report is designated as Trial Exhibit D-475.

278. The present unutilized capacity of the New Carlisle Municipal Electric Utility is limited to 100 Kva. New

Carlisle has no plans, tentative or firm, to expand, enlarge, purchase or add to present transmission facilities. Future growth of New Carlisle is not now contemplated. New Carlisle is presently unable to extend electric service to new industrial customers and is not preparing any economic feasibility or desirability studies of providing additional electric service to existing or potential customers or class of customers.

279. New Carlisle has never prepared any forecasts between 1968 and 1977 relating to peak demand, energy production, generation, wholesale purchases or electric revenues for any portion or all of the period between 1978 and 1990 which the Town is now utilizing for planning purposes.

280. In the period between 1969 and 1977, the New Carlisle Municipal Electric Utility has transferred funds at various times from the electric utility to the general fund of the Town to finance various operations of the municipality not related to its electric utility. The following schedule shows for each year the amount of funds transferred and loaned from the electric depreciation fund to the civil treasury:

Year	*Loans*	*Operating Expense*	*Other*
1969	$ 8,079.40	$ 3,975.00	N/A
1970	19,453.42	10,463.50	N/A
1971	8,000.00	15,142.75	N/A
1972	13,000.00	N/A	N/A
1973	7,598.00	N/A	N/A
1974	N/A	N/A	6,500.00
1975	N/A	N/A	10,000.00
1976	N/A	N/A	20,000.00
1977	N/A	N/A	11,602.49
TOTAL	$56,130.82	$29,581.25	$48,102.49

Stipulation of Facts

281. The New Carlisle Municipal Electric Utility provides no free service to the municipality or any of its agencies or departments, other than for "Historical Day" booths and for a town recreation park.

282. New Carlisle has no present sources of funds on hand to be used to finance construction, operation and maintenance of the electric utility system other than revenues from sales of electricity.

283. Pursuant to an Agreement dated May 1, 1956 between New Carlisle and defendant Indiana & Michigan Electric Company, New Carlisle agreed to purchase electric power and energy from I&M and I&M agreed to sell electric power and energy to New Carlisle. A true and complete copy of that 1956 Agreement is designated as Trial Exhibit D-21. That Agreement was superseded on May 9, 1968 when New Carlisle elected to be served by I&M pursuant to Tariff MRS. A true and complete copy of the 1968 Agreement, drafted by I&M and approved by the FPC, is designated as Trial Exhibit D-22.

284. New Carlisle sought and obtained three rate increases in the period between 1968 and the present. The first rate increase was effective from November 1, 1969, the second rate increase was effective from May 1, 1975, and the third was effective October 20, 1976.

285. In the period from 1968 to date, no cost of service study or rate of return study was prepared by or for New Carlisle either in connection with its rate increase filings or otherwise. New Carlisle has never prepared a study regarding its ability to serve large industrial customers.

286. At no time did New Carlisle conduct or review any comparisons nor has it ever done a study comparing the

electric rate paid by the Town with I&M's retail rates to other customers.

287. The following schedule, prepared on a calendar year basis, shows for the Town of New Carlisle, for the period from 1969 through July, 1976, the difference between the actual wholesale rate billings rendered to New Carlisle as a wholesale customer and the billings which would have been rendered to New Carlisle on the "appropriate" retail rate providing New Carlisle with the lowest cost of purchase power; for the period from August, 1976 through December, 1977, the difference between the actual wholesale rate billings rendered to New Carlisle as a wholesale customer and the billings on I&M's proposed "appropriate" retail rate, which would provide New Carlisle with the lowest cost of purchased power; and for the calendar year 1978, the difference between the projected wholesale rate billings under the proposed wholesale rate filed in FERC Docket No. ER78-382 and the projected retail billings, using the same projected billing parameters, as proposed by I&M in its retail rate filing with PSCI on January 30, 1978, all as set forth in the several comparative billing analysis Exhibits annexed to the "Request to Admit Facts and Interrogatory" served on New Carlisle (Negative numbers indicate, for those calendar years, that New Carlisle paid less on the wholesale rate; positive numbers indicate, for those calendar years, that New Carlisle paid more as a wholesale customer):

Year	*Wholesale v. Retail Billing Differential*
1969	$ + 2,172.12
1970	+ 3,691.80
1971	+ 3,514.95
1972	— 2,208.56
1973	— 3,010.62
1974	— 4,333.31

Year	*Wholesale v. Retail Billing Differential*
1975	$ — 20,661.60
1976	— 18,820.54
1977	— 8,599.94
1978	— 28,927.98

288. The following schedule shows for the Town of New Carlisle from August, 1968 through August, 1978, the difference between the actual wholesale rate billings rendered to New Carlisle as a wholesale customer and the billings which would have been rendered to New Carlisle on the actual "appropriate" retail rate then in effect providing New Carlisle with the lowest cost of purchased power, as set forth and described in defendants' answers to plaintiffs' interrogatories:

Period	*Wholesale v. Retail Billing Differential*
August, 1968-December, 1976	$ + 16,338.77
January-December, 1977	+ 16,290.69
January-August, 1978	+ 1,973.03
TOTAL	$ + 34,602.49

289. At various times the New Carlisle Municipal Electric Utility has received technical assistance from I&M and has, on at least one occasion, obtained services from I&M.

290. I&M sent a letter dated September 9, 1975 to the President of the Town Board of New Carlisle. A true and complete copy of that letter is designated as Trial Exhibit D-476. No steps were taken by the Town to explore alternative sources of power and energy. New Carlisle never communicated with any other electric utility (or group or

association of electric utilities) regarding the formation of or participation in a power pool or other similar coordination agreement.

291. New Carlisle joined with nine other plaintiffs in filing complaints against I&M, AEP and Service Corporation before the FPC in E-9548, and against I&M in this Court in S 75-210.

CITY OF NILES

292. The City of Niles is a municipality located in the State of Michigan, approximately eight miles north of the Indiana/Michigan border with a population of approximately 12,998.

293. Niles is a Michigan municipal corporation governed by a Mayor and Common Council.

294. Niles' electric utility is headed by the Manager of the Board of Public Works, a full-time municipal employee with responsibility for the management and engineering of the municipality's electric utility as well as its sewage treatment plant and water utility.

295. Niles has electric generation capability of its own; Niles has a hydro-plant with a nameplate of 460 kilowatts, located on the Dowagiac River, and seven substations ranging from 10,000 to 2,500 Kva which serve not only within the City limits but also certain parcels of a subdivision on the northeast part of the City, as well as customers along the hydro-plant line and customers abutting the City limits.

296. Niles is also supplied with power and energy by I&M via the City's single overhead line and the City's transmission loop.

Stipulation of Facts

297. The Township of Niles is geographically distinct from the City of Niles but is contiguous on all but the southwest corner of the City and the northeast corner which abuts on the County line. For the most part, I&M serves the Township of Niles.

298. Niles prepares Annual Reports of the operation of, among other services, its electric utility which includes an annual financial statement and/or independent audit. True and complete copies of the Annual Reports and/or independent audits are designated as Trial Exhibits D-492 through D-499, and D-502.

299. As of fiscal year-end 1977, Niles' electric utility has 12 industrial customers, 723 commercial customers and 5508 residential customers. However, any nonresidential customer may qualify for an industrial or commercial rate when its demand for power and energy so qualifies that customer.

300. Since 1968, Niles has not to its knowledge lost a single industrial or commercial customer.

301. Since 1968, Niles cannot identify, to its knowledge, any industrial or commercial customer which has considered locating in Niles and elected not to do so because of Nile's electric rates.

302. Since 1968 two commercial or industrial customers, Western Electric Company and Buy Low Market, began taking electric service from Niles.

303. Since 1968, to the knowledge of Niles' officials, no industrial customer has decided not to expand its facilities within Niles due to Niles' electric rates.

304. Since 1968, to the knowledge of Niles' officials, Niles cannot identify any commercial or industrial cus-

tomers served by Niles which has expanded its physical facilities or their electric demand in an area outside of the service area of Niles as a result of Niles' electric rates.

305. In 1974, the Manager of the Niles Board of Public Works prepared a report and recommendations derived from an electric rate study for the Niles Common Council. The results of that study were transmitted to the Board of Public Works and Common Council in a report entitled "Report and Recommendations derived from Electric Rate Study 1974 by S.A. Brett to the Board of Public Works and The Common Council of The City of Niles, Michigan, November 21, 1974." The purpose of the report was to attempt to eliminate inequities of the Niles 1972 rates, to calculate the cost of free services, and to demonstrate what free services meant to the different classes of customers in dollars and unit cost. A copy of that report is designated as Trial Exhibit D-506.

306. Niles has no plans, tentative or firm, to expand, enlarge, purchase or add to present generation and transmission facilities except for the possible installation of a second transmission loop. Niles is not preparing any economic feasibility or desirability studies of providing additional electric service to existing or potential customers or class of customers.

307. Niles has no documents reflecting any forecasts between 1968 and 1977 relating to peak demand, energy production, generation, wholesale purchases or electric revenues for any portion or all of the period between 1978-1990 which the City is now utilizing for planning purposes. The Niles utility uses a straight edge on a semi-log graph to project demands, and has calculated annual average present

increase over some past period of time and projected that percent increase into the future.

308. In the period between 1968 and 1977, Niles' electric utility has transferred funds at various times from the electric utility to the general fund of the City to finance various non-electric utility operations of the municipality. The following schedule shows for each year the amount of funds transferred directly from the electric utility as cash grants or for specific projects unrelated to the electric utility system and not to be repaid:

Year	*Cash Grants*	*Projects*
1968	$100,000.00	$150,000.00
1969	.00	105,000.00
1970	.00	12,270.28
1971	175,000.00	45,000.00
1972	172,000.00	5,500.00
1973	.00	102,739.41
1974	.00	.00
1975	.00	.00
1976	.00	.00
1977	.00	.00
TOTAL	$447,000.00	$420,509.69

309. The Niles electric utility provides electric service to the municipal departments of the City, including the police department and fire department, and also provides other additional services for which no payment is made to the electric utility. A list of the amounts of these free services for the period from 1968 to 1977 is as follows:

Free Services

1968	71,076.59
1969	72,277.91
1970	82,580.03
1971	76,942.10
1972	74,019.46
1973	75,019.48
1974	77,694.97
1975	95,000.12
1976	105,394.37
1977	137,355.61

310. Pursuant to an agreement dated June 4, 1956 between Niles and I&M, Niles agreed to purchase and I&M agreed to sell power and energy for the City of Niles. A true and complete copy of that 1956 agreement is designated as Trial Exhibit D-23. That agreement was supplemented by an Agreement dated September 26, 1960. A true and complete copy of the 1960 agreement is designated as Trial Exhibit D-24. The 1960 Agreement was superseded by an Agreement dated January 13, 1967. A true and complete copy of the 1967 Agreement is designated as Trial Exhibit D-25. That agreement was superseded on May 13, 1968 when Niles elected to be served by I&M pursuant to Tariff MRS. A true and complete copy of that 1968 agreement, drafted by I&M and approved by the FPC, is designated as Trial Exhibit D-26.

311. Niles obtained three rate increases in the period between 1968 and the present. The rate increases were effective August 1, 1971; January 13, 1975; and July 13, 1976. The rates charged by Niles are not regulated by the Michigan Public Service Commission, but are solely within the regulation of the Niles Board of Public Works and the Niles Common Council. The Common Council of Niles has occasionally failed to "muster" the required number of votes

for approval of rate changes but eventually "came around to see it as the Board of Public Works saw it" and approved the changed rate request.

312. In 1971 and in 1974 studies were conducted by the Niles Board of Public Works in an effort to approximate the cost of service for the various classes of customers. From representative data taken in the field, a judgment was made which estimated the approximate demand and load factor during the peak on the entire Niles system. Approximations and estimations were employed in making the calculations. Since Niles has estimated retirement of properties each year and has not used a retirement and investment work order system for units of equipment, no attempt has been made to base the level of rates to the different classes of customers on a percentage of invested capital. Niles has no knowledge of the total kilowatt billing demands per class or the actual maximum kilowatt demands.

313. The following schedule, prepared on a fiscal year basis, shows for the City of Niles, for the period from 1969 through July, 1976, the difference between the actual wholesale rate billings rendered to Niles as a wholesale customer and the billings which would have been rendered to Niles on the "appropriate" retail rate providing Niles with the lowest cost of purchase power; for the period from August, 1976 through December, 1977, the difference between the actual wholesale rate billings rendered to Niles as a wholesale customer and the billings on I&M's proposed "appropriate" retail rate, which would provide Niles with the lowest cost of purchased power; and for the calendar year 1978, the difference between the projected wholesale rate billings under the proposed wholesale rate filed in FERC Docket No. ER78-382 and the projected retail billings, using the same projected billing parameters, as proposed by I&M in its retail rate filing with PSCI on January 30, 1978, all as set forth in the several comparative

billing analysis Exhibits annexed to the "Request to Admit Facts and Interrogatory" served on Niles (Negative numbers indicate, for those fiscal years, that Niles paid less on the wholesale rate; positive numbers indicate for those fiscal years that Niles paid more as a wholesale customer):

Year	*Wholesale v. Retail Billing Differential*
1969	$ — 35,957.48
1970	— 17,048.24
1971	+ 1,244.38
1972	+ 2,024.62
1973	+ 97,187.81
1974	+175,047.06
1975	+140,516.58
1976	—168,241.78
197.	+262,508.88
1978	+ 4,128.33

314. The following schedule shows for the City of Niles from August, 1968 through August, 1978, the difference between the actual wholesale rate billings rendered to Niles as a wholesale customer and the billings which would have been rendered to Niles on the actual "appropriate" retail rate then in effect providing Niles with the lowest cost of purchased power, as set forth and described in defendants' answers to plaintiffs' interrogatories:

Period	*Wholesale v. Retail Billing Differential*
August, 1968-December, 1976	$ +203,821.43
January-December, 1977	+452,774.63
January-August, 1978	+154,230.71
TOTAL	$ +810,826.77

Stipulation of Facts

315. At various times the Niles electric utility has received technical assistance from I&M and has obtained services from I&M at a price established by I&M, which the City paid.

316. I&M sent a letter dated September 9, 1975 to the Mayor of Niles. A true and complete copy of that letter is designated as Trial Exhibit D-513A. Mayor Woodbridge gave this letter to the Manager of the Board of Public Works.

317. Niles joined with nine other plaintiffs in filing complaints against I&M, AEP and Service Corporation before the FPC in E-9548 and against I&M in this Court in S 75-210.

318. Mr. Brett, Manager of the Board of Public Works, contacted Consumers Power, whose lines are about 40 miles from the City limits. Mr. Brett did not communicate with NIPSCO whose lines are in the State of Indiana, approximately six miles from the Niles' city limits. To the knowledge of Mr. Brett, NIPSCO presently serves no customers in Michigan but does serve customers in northern Indiana.

319. After study and public hearings, Niles Common Council rejected the recommendation of the Board of Public Works to participate in a joint power supply venture, contrary to the recommendations contained in a report on the matter entitled "Report on Study of Joint Power Supply Venture" by Campbell DeBoe & Associates, Inc., engineers in July, 1977. A true and complete copy of that report is designated as Trial Exhibit D-509.

320. The Niles Board of Public Works and the Niles Common Council have each given their authorization for the City to participate in this litigation and in related litigation.

TOWN OF WARREN

321. The Town of Warren is a municipality occupying about 400 acres and located in Indiana, about 35 miles southeast of the City of Fort Wayne. Warren has a population of approximately 1250.

322. Warren is governed by an elected Board of Trustees, which is composed of four members. The position of Trustee is part-time. The Board's duties include ultimate responsibility for the operation of the Town, including its electric, water and sewage utilities, the parks and the Civil Town. Warren also has a Planning Commission consisting of eight members.

323. Warren's electric utility is headed by Steve Furniss, a full-time municipal employee with responsibility to oversee the day-to-day maintenance, operation and reconstruction of the municipality's electric utility.

324. In accordance with the requirements of the Public Service Commission of Indiana, Warren files Annual Reports on the operation of its electric utility with PSCI. True and complete copies of the Annual Reports of Warren to PSCI for each of the years from 1968 through 1977 are designated as Trial Exhibits D-518 through D-527.

325. In accordance with the requirements of Indiana law, the Indiana State Board of Accounts audits the operations of electric utilities on a periodic basis. True and complete copies of the State Board of Accounts Field Examiner's Reports of Examination of the Light Utility of the Civil Town of Warren for the periods January 1, 1969 through December 31, 1970; January 1, 1971 through December 31, 1971; January 1, 1972 through December 31,

1973; and January 1, 1974 through December 31, 1976 are designated as Trial Exhibits D-527 through D-531.

326. In accordance with requirements of Indiana law, the Town of Warren files a financial report for each calendar year with the Indiana State Board of Accounts.

327. Pursuant to Indiana statutory authority, Warren owns and operates an electric utility. From its inception (prior to 1924) until 1952, Warren's electric utility generated all of the electric power of its customers. Since 1952, when Warren stopped generating electric power, it has been supplied with its total requirements of electric power and energy by I&M.

328. Out of about 730 customers, Warren's electric utility has approximately 700 residential customers; the remaining customers are served on commercial tariffs. Warren's utility has no industrial customers.

329. No industrial customer is known to the Town of Warren to have expanded outside of the Town limits because of electric rates. In 1977, the Morgan Packing Plant left Warren. It consolidated its operations in an existing plant in Converse, Indiana. Zellers Construction Company has located in Warren since 1970. The major construction which has taken place in Warren since 1970 is the new Junior High School and the expansion of the facilities of the Methodist Memorial Home.

330. In 1977, the Electric Utility transferred $10,000 to the Water Utility. In 1975, the General Fund received a $5,000 transfer from the Electric Cash Reserve Fund.

Stipulation of Facts

331. The Electric Utility, in 1977, contributed the following percentages to the salaries of certain municipal employees:

Mary R. Rittenhouse	71.5%
Mary Jane Adsit	75%
Charles L. Booher	75%
Bruce Preston	75%

332. In 1978, the Electric Utility contributed the following percentages to the salaries of the following municipal officials:

Trustees	55%
Clerk-Treasurer	86%

333. Pursuant to an agreement dated February 9, 1960 between Warren and I&M, Warren agreed to purchase electric power and energy from I&M, and I&M agreed to sell electric power and energy to Warren. A true and complete copy of that 1960 agreement, drafted by I&M, is designated as Trial Exhibit D-27. That agreement was superseded on May 9, 1968 when Warren elected to be served by I&M pursuant to Tariff MRS. A true and complete copy of that 1968 agreement, drafted by I&M and approved by the FPC, is designated as Trial Exhibit D-28.

334. Warren sought and obtained one rate increase in the period between 1968 and the present. This rate increase, which became effective in December, 1976, was the first rate change since August 9, 1963, and included both a cost-of-service and flow-through increase. In October, 1978, Warren applied for a second flow-through increase.

Stipulation of Facts

335. The following schedule, prepared on a calendar year basis, shows for the Town of Warren, for the period from 1969 through July, 1976, the difference between the actual wholesale rate billings rendered to Warren as a wholesale customer and the billings which would have been rendered to Warren on the "appropriate" retail rate projected retail billings, using the same projected billing parameters, as proposed by I&M in its retail rate filing with PSCI on January 30, 1978, all as set forth in the several comparative billing and analysis Exhibits annexed to the "Request to Admit Facts and Interrogatory" served on Warren (Negative numbers indicate, for those calendar years, that Warren paid less on the wholesale rate):

Year	*Wholesale v. Retail Billing Differential*
1969	$ — 4,629.25
1970	— 6,643.74
1971	— 6,375.66
1972	— 13,581.91
1973	— 5,893.03
1974	— 6,147.06
1975	— 32,550.16
1976	— 29,370.52
1977	— 2,269.72
1978	— 37,782.19

336. The following schedule shows for the Town of Warren, from August, 1968 through August, 1978, the difference between the actual wholesale rate billings rendered to Warren as a wholesale customer and the billings which would have been rendered to Warren on the actual "appropriate" retail rate then in effect providing Warren with the lowest cost of purchase power, as set forth and described in defendants' answers to plaintiffs' interrogatories:

Period	*Wholesale v. Retail Billing Differential*
August, 1968-December, 1976	$ + 24,715.80
January-December, 1977	+ 32,127.05
January-August, 1978	+ 107.89
TOTAL	$ + 56,950.74

337. I&M sent a letter dated September 9, 1975 to Cecil Schwob, the President of Warren's Board of Trustees. A true and complete copy of that letter is designated as Trial Exhibit D-535. Mr. Schwob took no steps to explore alternative sources of power and energy.

338. Warren joined with nine other plaintiffs in filing complaints against I&M, AEP and Service Corporation before the FPC in E-9548 and against I&M in this Court in S 75-210.

Supreme Court, U. S.
FILED
JUL 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-2059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN ELECTRIC POWER COMPANY, INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, and INDIANA & MICHIGAN ELECTRIC COMPANY, Corporations,
Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA, Municipal Corporations,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Of Counsel:

JAMES J. OLSON
JOHN M. RIGBY
THEODORE M. BENDALL
JAMES R. FLECK
EDWARD A. CHAPLEAU

THOMAS R. EWALD
1000 Potomac St., N.W.
Washington, D.C. 20007
(202) 333-5533

GERALD M. STERN
DAVID R. BOYD
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

Counsel for Respondents

July 30, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

		Page
I.	STATEMENT OF THE CASE	2
II.	SUMMARY OF ARGUMENT	6
III.	ARGUMENT	9
	A. The Court Of Appeals Correctly Held That The Noerr-Pennington Doctrine Does Not Preclude Consideration Of Petitioners' Rate Practices In The Circumstances Of This Case	9
	B. Petitioners' Conduct Is Not Immunized By Exclusive Jurisdiction	13
	C. Petitioners' Anticompetitive Acts And Practices Are Not Sheltered By The "State Action" Exemption	20
	D. The Lower Courts Correctly Recognized A Utility's Obligation To Consider The Anticompetitive Impact Of Its Dual Rate Structure In Determining The Level Of Its Federal Rates	23
	E. The Court Of Appeals Correctly Awarded The Respondent Municipalities Their Litigation Expenses In Resisting Petitioners' Threats To Their Power Supply	27
IV.	CONCLUSION	30

TABLE OF AUTHORITIES

Cases: Page

Adickes v. *Kress & Co.*, 398 U.S. 144 (1970) 28
Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 27-29
Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) 18
California v. *Federal Power Commission*, 369 U.S. 482 (1962) 9, 16
California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 11, 12
California Retail Liquor Dealers Association v. *Midcal Aluminum, Inc.*, 100 S. Ct. 937 (1980) .. 20, 22
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976) 7, 9, 13, 16
Central Hudson Gas & Electric Corp. v. *Public Service Commission of New York*, 48 U.S.L.W. 4783 (June 20, 1980) 12
City of Lafayette, Louisiana v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) 12, 20-21
City of Mishawaka, Indiana v. *American Electric Power Co.*, 465 F. Supp. 1320 (N.D. Ind. 1979) ..*passim*
City of Mishawaka, Indiana v. *American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980) .....*passim*
City of Mishawaka, Indiana v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978) .....*passim*
Conway Corp. v. *Federal Power Commission*, 510 F.2d 1264 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976) 25, 26
Dairy Foods, Inc. v. *Dairy Maid Products Cooperative*, 297 F.2d 805 (7th Cir. 1961) 29
Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 11, 13
Federal Power Commission v. *Conway*, 426 U.S. 271 (1976) 8, 23, 25-27
Federal Power Commission v. *Hunt*, 376 U.S. 515 (1964) 18
Federal Power Commission v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962) 18

TABLE OF AUTHORITIES—Continued

	Page
Friedman v. *Rogers*, 440 U.S. 1 (1979)	12
Gordon v. *New York Stock Exchange*, 422 U.S. 659 (1975)	9, 16
Gulf States Utilities Co. v. *Federal Power Commission*, 411 U.S. 747 (1973)	9, 16
Hampton v. *Hanrahan*, 100 S. Ct. 1987 (1980)	28
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968)	5, 18
Hughes Tool Co. v. *Trans World Airlines*, 409 U.S. 363 (1973)	9
Locklin v. *Day-Glo Color Corp.*, 429 F.2d 873 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971)	29
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951)	18, 25
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975)	28
Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973)	9, 16-17
Parker v. *Brown*, 317 U.S. 341 (1943)	20
Roadway Express, Inc. v. *Piper*, 48 U.S.L.W. 4836 (June 23, 1980)	28
Sargent-Welch Scientific Co. v. *Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978)	5
Scott v. *Local 377, Intnl. Brotherhood of Teamsters*, 548 F.2d 1244 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977)	28
Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963)	16
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931)	22
United Mine Workers v. *Pennington*, 381 U.S. 657 (1965)	11
United States v. *Philadelphia National Bank*, 374 U.S. 321 (1963)	9, 16
United States v. *Radio Corporation of America*, 358 U.S. 334 (1959)	9

TABLE OF AUTHORITIES—Continued

Page

Vaughan v. *Atkinson*, 369 U.S. 527 (1962)
Wilmorite, Inc. v. *Eagen Real Estate, Inc.*, 454 F. Supp. 1124 (N.D.N.Y. 1977), *aff'd on opinion below*, 578 F.2d 1372 (2d Cir.), *cert. denied*, 439 U.S. 983 (1978) 11

Statutes:

Federal Power Act, § 205, 16 U.S.C.A. § 824d (1974 & Supp. 1980) 23-27
Sherman Act, § 2, 15 U.S.C.A. § 2 (1973 & Supp. 1980) 2, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2059

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY, Corporations,
Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA, Municipal Corporations,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I. STATEMENT OF THE CASE

Petitioners' statement of the case attempts to isolate their rate practices from their other anticompetitve acts and practices that, taken together, were found to constitute violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, by the United States District Court for the Northern District of Indiana, *City of Mishawaka, Indiana* v. *American Electric Power Co.*, 465 F.Supp. 1320 (N.D. Ind. 1979), and by the United States Court of Appeals for the Seventh Circuit, *City of Mishawaka, Indiana* v. *American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980).[1] Petitioners' selective view of the facts has been rejected by the lower courts, however, *City of Mishawaka*, 465 F.Supp., at 66a, 76a; *Mishawaka II*, at 19a-20a, 24a, and offers a distorted perspective of those decisions to this Court.[2] Since an understanding

---

[1] Unless otherwise indicated, all references to the court of appeals' decision will be to the second decision of the court of appeals, and that decision will be referred to as *Mishawaka II* when appropriate to make the citation reference clear. References to the first decision of the court of appeals, *City of Mishawaka, Indiana* v. *Indiana & Michigan Electric Power Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978), will be identified as *Mishawaka I*, and the district court decision will be referred to as *City of Mishawaka* in cases in which the context does not indicate that the citation refers to that decision. All three decisions will be cited to as set forth in petitioners' appendix and identified by page in that appendix. Citations to the district court's Findings of Fact will be identified as "Finding" and will likewise be cited to the page in petitioners' appendix where that finding appears.

[2] As the court of appeals explained:

> "The utility would have us consider each separate aspect of its conduct separately and in a vacuum. If we did, we might agree with the utility that no one aspect

of the total case is essential to assess the questions presented, respondents set forth their separate statement of what transpired below.

Respondents are ten municipalities that own and operate their own electric utility systems. Each is located within the service area of the petitioner Indiana & Michigan Electric Company ("I&M"), and each purchases its bulk electric power requirements from I&M for its own use and for resale to its customers. The courts below found that, through I&M, the petitioners have a monopoly of the retail sales of electricity within I&M's service area, and that they likewise have a monopoly of the supply of wholesale electric power on which the municipalities depend for their own requirements and for retail sales of electricity to their customers.[3]

As the lower courts found, petitioners have had an active policy of increasing I&M's monopoly in retail sales of electricity by acquiring the facilities of municipally-owned utilities and thereby obtaining the

---

standing alone is illegal. It is the mix of the various ingredients of utility behavior in a monopoly broth that produces the unsavory flavor." 24a.

[3] I&M's direct sales to customers within its service area, ("retail rates") are regulated by the Indiana Public Service Commission and the Michigan Public Service Commission, and can only be made pursuant to rates previously approved by them. I&M's sales to the plaintiff municipalities for resale to their customers ("wholesale rates") are subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC" or "Commission"). Those rates are not approved by the Commission prior to going into effect. Rather, they are charged at levels established by I&M's rate filings, subject to refund after the Commission adjudicates the appropriate rate. As the Seventh Circuit noted, no wholesale rate filed by I&M has been approved at the level filed, 16a. That observation remains true today.

right to serve the municipality's customers directly at retail. *City of Mishawaka*, 54a; *Mishawaka II*, 23a. Petitioners' attempt to portray their acquisition policy as a product of the past, Petitioners' Br. at 10, is belied by the record. The district court found that petitioners' acquisition policies, and the anticompetitive practices that propel them, continue. *See* Findings 76-84; 142a-148a. *City of Mishawaka*, 54a.[4] The Seventh Circuit agreed, commenting, "There were also utility attempts to acquire certain municipal systems and also interest expressed by the utility in acquiring others in the relevant service area extending into 1977," 23a; *see also* 20a.

The district court examined the petitioners' rate practices, their repeated discriminatory threats to the municipalities' power supply, and their municipal takeover program, and found each to be an integral part of a pattern of "anticompetitive and exclusionary acts and practices having the purpose and effect of preserving and expanding I&M's existing monopoly in retail sales of electric power." 57a. As the Seventh Circuit summarized, "It was the trial court's view that the utility's use of the diverse rate regulation structure and its other acts contributed to a municipal system's vulnerability to utility takeover," 23a, and it affirmed the district court's finding of liability on the ground that its "assessment of the evidence as a whole" led it to concur that "all the evidence

---

[4] As the district court stated:

> "At issue in this case is the manner in which defendants have used the leverage afforded by [I&M's] total monopoly over plaintiffs' power supply to preserve and expand their monopoly of retail sales in I&M's service area. The evidence shows that defendants have engaged in anticompetitive and exclusionary acts and practices having the purpose and effect of preserving and expanding I&M's existing monopoly in retail sales of electric power." 57a.

of the utility's activities [disclosed] a specific utility intent to serve its monopolistic purposes at municipal expense." 21a.

As the Seventh Circuit noted, this case is "complex factually and legally." 8a. Thus, petitioners' attempt to focus on I&M's rate practices to the exclusion of their other anticompetitive acts and practices distorts the basis of the decisions below. The court of appeals also recognized that the evidentiary record below is "voluminous" and that the district court's approach toward that record was obviously influenced by the "serious reservations" it expressed regarding the credibility of highly-placed management officials who attempted to disclaim knowledge of the obvious consequences of their actions. 9a. *See also* Finding 85; 148a. An examination of the decision below shows that the Seventh Circuit was not content merely to accept the trial court's assessment of the facts, and that its affirmance rests on its own detailed and knowledgeable review of the record.

Petitioners' arguments are premised in major part on their assertion that the court of appeals simply followed a "ritual application of antitrust principles" to the instant case. Petitioners' Br. at 12-14. In fact, the contrary is true. For example, although that court earlier had held that specific intent need not always be proved to establish a Sherman Act violation, *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978), it specifically declined to follow that broader rationale here. Instead, the court limited the reach of its affirmance to cases presenting conduct evidencing "specific utility intent to serve its monopolistic purposes at municipal expense," which it found to be established by the evidence as a whole. 21a. Similarly, the court of appeals reversed the district court's damage award, which had been based on *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), finding that doctrine inapplicable to

a regulated utility that might ultimately be required to refund its overcharges in federal rates and prescribing a more limited approach to the damage question to be followed by the district court on remand. 29a-31a. The Seventh Circuit also vacated portions of the lower court's injunctive decree that it found to lack the "flexibility . . . required . . . so as to permit the utility an opportunity to justify some short term variations," 35a-36a, and outlined a number of more limited remedial measures for the district court's consideration, specifically admonishing that court to be "careful not to encroach any further on the rate making process than may be temporarily required by antitrust considerations." 37a. Finally, the court instructed the district court to provide a mechanism to "return rate control to the regulating commissions established respectively by Congress and the state legislatures for that purpose." 36a.

II. SUMMARY OF ARGUMENT

An examination of the opinion sought to be reviewed reveals that the Seventh Circuit's decision does not reflect "an expansive view of the application of antitrust laws to the rates of the regulated electric utility industry", as Petitioners suggest. Petitioners' Br. at 15. The court did not view simple disparities in state and federally-regulated rates as a basis for antitrust liability, and its opinion does not countenance any relief based on so simple a premise. To the contrary, the court of appeals decision represents a careful accommodation of antitrust and regulatory principles. The decision does not foretell the demise of the regulated public utility, as the petitioners might wish this Court to believe, and the unique facts on which it rests will prove difficult to duplicate in the other antitrust cases cited in Petitioners' Brief.

Petitioners' *Noerr-Pennington* argument is based on a selective view of the record which focuses on their rate-

making practices and conveniently ignores the various other anticompetitive acts and practices shown by the evidence, which combined to demonstrate the specific intent to monopolize that established a violation of Section 2 of the Sherman Act. The court of appeals correctly rejected the contention that *Noerr-Pennington* precludes any consideration of petitioners' rate practices along with their other anticompetitive acts and practices. Its decision is supported by this Court's holding in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); by the finding that petitioners abused the administrative process, and by the relationship of petitioners' rate practices with their other illegal acts and the proof of petitioners' intent to expand their monopoly position at the municipalities' expense. The court of appeals' rejection of the *Noerr-Pennington* defense is likewise supported by the absence of circumstances suggesting that the kinds of core First Amendment concerns on which the *Noerr-Pennington* doctrine is based are seriously implicated by the facts of this case.

Similarly, petitioners' assertion that the Federal Energy Regulatory Commission has exclusive jurisdiction to consider petitioners' rate practices is based on the mistaken assertion that the court of appeals' decision creates a conflict between the Federal Power Act and the Sherman Act. The court of appeals decision reflects a careful accommodation of the antitrust laws and the Federal Power Act, however, and it avoids interference with the regulatory functions of the FERC. This Court has repeatedly held that regulated electric utilities are not immunized from antitrust liability, and has previously declined to grant certiorari to review this issue in this very case. The issue is even less certworthy now than it was before.

The lower courts' interpretation of the Federal Power Act is likewise correct. Following this Court's decision in *Federal Power Commission* v. *Conway*, 426 U.S. 271 (1976), the courts below correctly held that petitioners must consider the possible anticompetitive effects of disparities between their wholesale and retail rates before filing their wholesale rates and putting them into effect. Petitioners' attack on this holding rests on a mistaken interpretation of the decisions below and is without merit. Similarly, the court of appeals' award of the respondent municipalities' litigation expenses in resisting petitioners' threats to their power supply correctly applies accepted principles. Petitioners' challenge on this point was not raised below. It is without merit and does not warrant this Court's review.

Petitioners can point to no conflict among the circuits on any of the myriad questions they present for review, and the full contours of this decision remain to be spelled out by the district court under the Seventh Circuit's careful instructions on remand. The decision below is correct and, in any event, does not warrant this Court's review.

III. ARGUMENT

A. The Court Of Appeals Correctly Held That The Noerr-Pennington Doctrine Does Not Preclude Consideration of Petitioners' Rate Practices In The Circumstances Of This Case.

Petitioners' *Noerr* v. *Pennington* theory would cut with a broad swath in the antitrust laws, where "repeal . . . by implication is not favored and not casually to be allowed."[5] *Gordon* v. *New York Stock Exchange*, 422

---

[5] The breadth of the antitrust exemption urged by petitioners is at odds with this Court's repeated holdings that public utilities are not exempt from the antitrust laws merely because they are regulated by state or federal agencies, *see, e.g., Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747 (1973); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *California* v. *Federal Power Commission*, 369 U.S. 482 (1962). Petitioners' argument now seeks to erect a separate basis for an implied immunity from the antitrust laws, advancing their tenuous First Amendment interests in an indirect effort to revive arguments for antitrust immunities that have been repeatedly rejected under the Federal Power Act. Acceptance of petitioners' argument also would eradicate a substantial body of antitrust precedents applicable to other regulated entities which generally act on the basis of petitions filed with the respective authorities that regulate important aspects of their conduct. *E.g., United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963) (applying the Clayton Act to bank mergers that were subject to federal regulatory approval); *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959) (holding that the exchange of radio stations that had been approved by the Federal Communications Commission was nevertheless subject to attack in an antitrust proceeding); *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363 (1973) (finding antitrust immunity for the activities in question but cautioning that not all activities that were regulated by the CAB would be afforded similar immunities).

U.S. 659, 682 (1975). It is not supported by the decisions of this Court or justified by the facts of the case.

The Seventh Circuit's determination that *Noerr-Pennington* does not preclude an examination of I&M's rate practices in this case is correct. As that court noted, petitioners' rate applications violated Section 205 of the Federal Power Act, 16 U.S.C. § 824d, in that the utility failed to consider the discriminatory effects of its dual rate structure and consider whether they might be avoided. 15a-16a; *see* Part III D, *infra*. Moreover, the court observed that "[t]he utility cannot be heard to say that it does not know that its wholesale rates will have an impact on the municipalities in their retail competition." 16a. The Seventh Circuit endorsed the district court's conclusion that the petitioners patterned I&M's rate filings in a manner that effectively abrogated the protections the respondent municipalities might expect from the FERC, and itself characterized petitioners' practice of filing higher superseding rates before the Commission had adjudicated the former rates as one that created a situation in which "the victim municipalities have been continually living with unregulated wholesale rates." *Id.* As the court of appeals concluded, this "continuing situation appears to us to be an abuse of the administrative process tending to produce, with the other conduct of the utility, an illegal result." *Id.* "The dual regulatory process is being taken undue advantage of by the utility, thwarting the intended balance of federal and state regulation." *Id.*

This conduct, combined with petitioners' unjustified threats to the municipalities' power supply and their demonstrated "appetite for acquiring faltering municipal systems . . . thereby converting municipal retail customers to [their] own," 17a, led the Seventh Circuit to reject petitioners' *Noerr-Pennington* defense. As that court noted, the utility "should not be permitted to "acquire

immunity by seeking refuge under the umbrella of 'political expression,' " 16a, quoting *California Motor Transport Co.* v. *Trucking Unlimited, supra,* 404 U.S. 508, 513 (1972). The court explained:

> "Were we to view it otherwise, the federal and state regulatory processes would provide the utility with a method of effectively advancing its illegal monopolistic purposes while maintaining an outward appearance of total innocence and shielded from the Sherman Act." 15a.

This conclusion is supported by the facts of this case and is entirely consistent with the decisions of this Court.[6] Like the doctrine of exclusive jurisdiction, *Noerr-Pennington* is a doctrine of statutory construction.[7] Since

---

[6] Other lower courts have found an exception to the *Noerr-Pennington* doctrine when the conduct of a regulated entity "was part of a larger scheme employing unprotected anticompetitive and monopolistic practices." *Wilmorite, Inc.* v. *Eagen Real Estate, Inc.,* 454 F.Supp. 1124, 1136 (N.D.N.Y. 1977), *aff'd on opinion below,* 578 F.2d 1372 (2d Cir.), *cert. denied,* 439 U.S. 983 (1978).

[7] In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), this Court refused to "impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Id.,* at 137. As the decision made clear, the Court's interpretation of the congressional intent was motivated by its belief that application of the Sherman Act to this conduct would impair the flow of information to the representative branches of government. *Id.* Of "at least equal significance" was the Court's belief that such an interpretation may be at odds with the recognized First Amendment right to petition the government for a redress of grievances. *Id.* at 137-38. *See also, United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965); *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972).

its application ultimately turns on a determination of congressional intent, courts applying *Noerr-Pennington* must recognize the strong presumption against implied repeal of the antitrust laws and, accordingly, be careful not to effect wholesale repeals of the Sherman Act. *Cf. City of Lafayette, Louisiana* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398-400 (1978).

Here there is little if any threat to the kinds of First Amendment concerns that underlie the *Noerr-Pennington* doctrine.[8] As the Court stated in *City of Lafayette, supra*, 435 U.S. at 400, *Noerr-Pennington* has not been applied in cases "which, though implicating those fundamental policies, [were] not thought severely to impinge upon them." At issue in this case is the petitioners' dual rate structure, the federal component of which is automatically put into effect by petitioners upon the filing of a new wholesale rate which remains in effect, without regulatory review until the FERC adjudicates its justness and reasonableness. Unlike *Noerr-Pennington* and *California Motor Transport*, this is not a case where the parties have an opportunity to protect their competitive interests in the normal give-and-take that precedes an ultimate decision by a legislator or public official to favor one position at the expense of another. Instead, as the Seventh Circuit found, the conduct in question is essentially unregulated. 16a. And the respondents' complaint is not simply that the utility petitioned for a higher rate, but that the petitioners used

---

[8] Assertions of First Amendment protection for commercial speech activities generally do not invoke the same rigorous scrutiny as do constitutional claims related to the kinds of speech that go to the very heart of the First Amendment. See generally, *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 48 U.S.L.W. 4783, 4784 (June 20, 1980); *Friedman* v. *Rogers*, 400 U.S. 1, 10, n.9 (1979).

these unregulated wholesale rates as one of a number of weapons designed to impair the municipalities' competitive position and ultimately to promote their sale. This conduct finds no shelter in the First Amendment, or in statutory interpretations that are motivated by constitutional concerns.

The result advocated by petitioners is precluded by this Court's decision in *Cantor* v. *Detroit Edison Co.*, *supra*, 428 U.S. at 601-602, and is not justified on the facts of this case. As the Court noted in *Cantor*, actions taken by regulated public utilities are "typically . . . a blend of private and public decisionmaking." *Id.*, at 592. The Court refused to afford a *Noerr-Pennington* defense to the electric utility in that case, however, notwithstanding the fact that the practice there at issue had been embodied in a rate filing approved by the State utility commission, stating, "nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff . . . is a sufficient reason for conferring antitrust immunity on the proposed conduct." *Id.*, at 601-602.

B. Petitioners' Conduct Is Not Immunized By Exclusive Jurisdiction.

Both the Department of Justice and the Federal Energy Regulatory Commission previously advised this Court that an implied immunity from the antitrust laws would not be appropriate in this case, *see Indiana & Michigan Electric Co.* v. *City of Mishawaka, Indiana*, No. 77-689 (October Term, 1977), Brief for the United States As Amicus Curiae, at 8-13, and the Court refused to grant certiorari to review this issue. 436 U.S. 922 (1978). A fair assessment of the court of appeals' subsequent decision, and in particular its pronounced solicitude for the FERC's jurisdiction and unique competence, confirms that these earlier judgments were correct.

Petitioners' argument for exclusive jurisdiction rests on a series of false assumptions. First, petitioners contend that the Seventh Circuit created an "overcharge theory" under which proof that the FERC has set a just and reasonable rate below that charged by the utility establishes antitrust liability. Petitioners' Br. at 4, 20. Petitioners then raise the spectre of disruption of all federal regulatory schemes that provide for collection of proposed rates subject to refund, Petitioners' Br. at 21, and intimate that the Seventh Circuit has improperly injected the federal courts into the ratemaking business. Petitioners' Br. at 24-25. Based on this hyperbole, and with only passing analysis of the case law governing the exclusive jurisdiction doctrine, petitioners assert that the "repugnancy between the Federal Power Act and court-ordered ratemaking under the Sherman Act effects an implied repeal of the Sherman Act." Petitioners' Br. at 22.[9]

Petitioners' ultimate argument might be more persuasive if the premises on which it rests were correct. Antitrust liability was not based on the simple fact that the FERC determined that I&M's rates were unjust and unreasonable and ordered refunds, however. To the contrary, the Seventh Circuit specifically restricted antitrust liability to cases where the evidence demonstrates "a specific utility intent to serve its monopolistic purposes

---

[9] Petitioners pose the question for review to be as follows:

> "Did not the Court below err in holding that the amount of statutory refund (or the district court's estimate thereof) is a 'monopolistic overcharge' *giving rise to liability under Section 2 of the Sherman Act?*" Petitioners' Br. at 4. (Emphasis added.)

The short answer to that question is that the court did not err in that regard because it did not so hold.

at municipal expense." 21a. Nor does the Seventh Circuit's opinion reflect its acquiescence in "court-ordered ratemaking." Petitioners' Br. at 22. To the contrary, the court of appeals recognized that the FERC has "substantially greater expertise" in ratemaking questions, 27a, and specifically admonished that "[t]he courts should not be in the rate fixing business." 32a. The Seventh Circuit further held that the FERC's determination of the just and reasonable rate was the more accurate measure of any overcharge that petitioners may have imposed, and commented that, in view of the refunds that would be ordered under the Federal Power Act, damages would have to be based on "specific injuries they have suffered as a result of the utility's overcharges and other monopolistic practices." 30a.[10]

---

[10] While the Seventh Circuit did suggest that the district court might consider estimating the probable overcharge for periods not yet adjudicated by FERC, it likewise invited the trial court to stay its damage ruling until the FERC has ruled, and it made clear that the Commission's decision is ultimately the determinative standard of overcharge. At the time the Seventh Circuit issued its decision, the FERC had not ruled on petitioners' 1978 wholesale rate. Subsequent to the Seventh Circuit's ruling, however, an Administrative Law Judge of the FERC issued an Initial Decision adjudicating I&M's 1978 wholesale rate and finding that rate to be unjust, unreasonable, and discriminatory. Thus, the prospect of the district court's estimating the extent of overcharge without the benefit of an FERC ruling is illusory. Meanwhile, in the 1976 rate case, the FERC sustained the ALJ's earlier decision that I&M's wholesale rate increase was unjust, unreasonable, and discriminatory. Petitioners' boast that the FERC's decision approved 96% of I&M's rates during the 1976 rate period, Petitioners' Br. at 25, ignores the fact that FERC's decision holds approxi-

Decisions of this Court establish that immunity from the antitrust laws "is not favored" and will only be implied in cases presenting a " 'plain repugnancy between the antitrust and regulatory provisions.' " *Gordon* v. *New York Stock Exchange*, *supra*, 422 U.S. at 682, quoting *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963). "Repeal is to be regarded as implied only if necessary to make the [regulatory system] work, and even then only to the minimum extent necessary." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).

This Court has repeatedly held that public utilities are not exempt from the antitrust laws merely because they are regulated by state and federal agencies. *See*, *Cantor* v. *Detroit Edison Co.*, *supra*; *Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747 (1973); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *California* v. *Federal Power Commission*, 369 U.S. 482 (1962). "[S]ince our decision in *Otter Tail Power Co.* v. *United States*, *supra*, there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities." *Cantor*, *supra*, 428 U.S. at 595, n.35.

Part II of the Federal Power Act, on which petitioners rely, does not expressly exempt electric utilities from the antitrust laws. As this Court observed in *Otter Tail*, "There is nothing in the legislative history [of Part II of the Federal Power Act] which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history . . . in-

---

mately 89% of I&M's overcharges to the plaintiffs during that period to be unjust, unreasonable, and discriminatory. The municipalities' price squeeze claims in that proceeding remain to be adjudicated and may result in additional rate reductions.

dicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." 410 U.S. at 373-374.[11]

Here, the Seventh Circuit was careful not to create a repugnancy between the antitrust and regulatory regimes, and it approved antitrust liability and remedies only insofar as they complement regulatory remedies. For example, although the FERC does not consider intent to be essential to a determination of a "price squeeze" under the Federal Power Act, *see* 19a, and cases cited therein, the court of appeals required specific intent for an antitrust violation. 21a. The court carefully outlined the possible damages and injunctive relief in a manner that assures that the antitrust remedies supplement those of the FERC. Thus, the court's discussion of damages makes it clear that the trial court can only award damages for specific injuries not remedied by FERC-

---

[11] The argument favoring exclusive jurisdiction is weaker here than that held insufficient in *Otter Tail*. There Congress had authorized the Commission to order interconnections and had rejected a provision that would have required a utility to "wheel" energy over its lines, relying instead on voluntary utility action. The dissenters in *Otter Tail* indicated that, but for these congressional decisions, they too would have voted against exclusive agency jurisdiction. 410 U.S. at 390-391, n.7 (Stewart, J., dissenting). Here, there is no such evidence that Congress intended to insulate a utility's structuring of the relationship between its wholesale and retail rates from antitrust scrutiny. Rather, the limitations Congress placed on the Commission's rate setting authority suggest that the Congress intended the antitrust laws to complement the authorities of the FERC and the respective state commissions, and to regulate the conduct that neither the FERC nor the state commissions can regulate effectively.

ordered refunds, 29a-30a,[12] and the possible relief on remand is generally circumscribed to relief that complements the FERC jurisdiction and recognizes its primacy in ratemaking matters. *See* 35a-37a. Finally, the Seventh Circuit regarded its suggested injunctive measures to be only temporary and specifically instructed the district court to return full rate control to the FERC and responsible state agencies once petitioners had dem-

---

[12] Petitioners assert that the statutory refund under the Federal Power Act should be "the exclusive remedy for any difference between the rate requested (and collected subject to refund) and the rate ultimately found to be just and reasonable by the Federal Commission." Petitioners' Question 3A, Petitioners' Br. at 3. As the Seventh Circuit stated, however, refunds are "not a complete cure for the illegal activities of the utility." 24a. *See also Mishawaka I*, at 177a-178a. The Commission's authority to adjust wholesale rates in response to its determination of an anticompetitive price squeeze is inadequate to compensate the victims for the antitrust violation. Save for post-suspension refunds of unjustified increases ordered in ongoing proceedings, the FERC is powerless to remedy past unreasonable rates: *i.e.*, it cannot award retroactive reparations. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951). Moreover, once the suspension period has expired, the utility's wholesale customers must pay the filed rate until the Commission finds that rate to be unlawful *Id.* at 251-252. If antitrust remedies were unavailable, wholesale customers would have no remedy for competitive injuries suffered in the interim. Post-suspension refunds, as the Court has observed, are an imperfect compensation for unreasonable rates. *See, e.g., Federal Power Commission* v. *Hunt*, 376 U.S. 515, 524-525 (1964); *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154 (1962). They are even less adequate compensation for the effects of an antitrust violation, for which Congress has authorized treble damages. *See, e.g., Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 488-494 (1968); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-265 (1946).

onstrated a good faith attempt to comply with their obligations. 36a.

Petitioners' prediction that the decision below will open the federal courts to "a whole new series of elaborate and burdensome problems" and "fresh, unaccustomed and extremely time-consuming burdens," Petitioners' Br. at 25, ignores the value of these decisions in alterting electric utility companies to the risks of monopolistic behavior, and the fact that *Mishawaka II* limits antitrust liability to cases presenting proof of specific intent to monopolize. Few companies have engaged in such a blatant pattern of anticompetitive acts and practices as did the petitioners in this case. Fewer still will be tempted to engage in such illegal conduct in the future. The burdens of compliance with the standards announced in *Mishawaka II* are not onerous and should not be a cause for concern by this Court.

Petitioners' conduct is not immunized by an implied repeal of the Sherman Act. This Court need not grant certiorari to confirm that fact.

C. Petitioners' Anticompetitive Acts And Practices Are Not Sheltered By The "State Action" Exemption.

Petitioners, focusing on their rate practices in isolation from their other anticompetive acts and practices, argue that the Seventh Circuit erred in sustaining "price squeeze liability." Petitioners contend that their ratemaking practices are immune under the "state action" exemption. Petitioners' Br. at 25-28. Petitioners' attempt to immunize their Sherman Act violations with the "state action" exemption is no more persuasive than their argument for exclusive jurisdiction.[13] Certiorari need not be

---

[13] The Seventh Circuit rejected petitioner I&M's *Parker* v. *Brown* "state action" position in its first appeal. *See Mishawaka I*, at 166a. I&M chose not to present this question for the Court's consideration in the first petition for certiorari, however, and relied only on its exclusive and primary jurisdiction arguments.

granted to review this question, which was correctly decided below.

As this Court recently summarized in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 100 S.Ct. 937 (1980), two standards must be met to qualify for antitrust immunity under *Parker* v. *Brown*, 317 U.S. 341 (1943):

> "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 100 S.Ct. at 943, quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978).

Parker v. *Brown* rests on principles of federalism. *Midcal, supra*, 100 S.Ct. at 942; *City of Lafayette, supra*, 435 U.S. at 400. However, as Mr. Justice Brennan noted in *City of Lafayette*, its implied immunity has been "unavailing to prevent antitrust enforcement which, though implicating those fundamental policies, was not thought severely to impinge upon them." *Id.* Thus, persons seeking a "state action" exemption must "demonstrate that there are countervailing policies which are sufficiently weighty to overcome the presumption [that the antitrust laws apply]." *Id.* Moreover, "even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." *Id.*, at 417.

These principles mandate rejection of petitioners' argument. As the Seventh Circuit recognized, neither Michigan nor Indiana has approved the price squeeze. *Mishawaka I*, 166a. Indeed, the record does not suggest that their regulatory agencies even consider the possible anticompetitive effects of the relationship of wholesale and retail rates, much less adopt policies that reflect a "clearly articulated and affirmatively expressed . . . state policy" on that point that is "actively supervised by the State itself." *Midcal, supra*, 100 U.S. at 943. Indiana and

Michigan appear to have no policy with respect to the price squeeze issue at all, and certainly none that is "sufficiently weighty to overcome the presumption" against implied repeal of the antitrust laws, *City of Lafayette, supra*, 435 U.S. at 400, and to prevent the lower courts' consideration of petitioners' rate practices as an element of their overall anticompetitive strategy.[14]

Petitioners make no argument that the policies of Indiana or Michigan would be impaired in any way by the decision below, and the record is barren of any evidence that would suggest that to be the case. These states simply do not have a policy with respect to the price squeeze here at issue, and it is not a factor in their rate determinations. Thus, an implied repeal based on *Parker* v. *Brown* would be inappropriate to recognize the states' nonexistent regulatory policies and interests when a similar implied repeal is not required to protect FERC regulation, which does address this subject, though partially and ineffectively.

Petitioners' further argument that the price squeeze was forced on them by regulatory agencies' decisions is refuted by the evidence. As the Seventh Circuit observed in *Mishawaka I*,

> "The challenged activity here is a dual rate structure. The state utility commissions have only put the imprimatur of their sanction on the retail rates charged by the defendant. The price squeeze has not been blessed by Indiana or Michigan." 166a.

---

[14] The concurring opinions of the Chief Justice and Mr. Justice Marshall likewise support this position. As Mr. Justice Marshall commented, both he and the Chief Justice agreed that "any implied 'state action' exemption from the antitrust laws should be no broader than is necessary to serve the State's legitimate purposes." *City of Lafayette, Louisiana* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 417 (1978) (Marshall, J., concurring).

A "price squeeze" was defined in *Mishawaka II* to be "a situation where a monopolist charges its wholesale customer a wholesale rate high enough to impede that customer's competition with the monopolist in the retail market." 7a, n.4.[15] The decision below is based on a finding of petitioners' specific intent "to serve [their] monopolistic purposes at municipal expense," 21a, and the court of appeals' concurrence with the trial court's determination that "the utility was 'price squeezing' the municipal systems into financial extinction and thereby setting the stage for acquisition of the municipal retail customers as its own." 12a.

The Seventh Circuit's decision is supported by *Cantor*, on which it relied, and by this Court's subsequent decisions in this area. As in *Cantor* and *Midcal*, the states' interest and involvement in the precise conduct in question does not justify an implied repeal of the antitrust laws. This case thus does not present a certworthy issue, particularly in view of this Court's recent full discussion of the *Parker* v. *Brown* principles in *Midcal* and the Seventh Circuit's consistency with them.

---

[15] Petitioners suggest that *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), requires that the court of appeals reverse on liability in view of its vacation of the damage award. *Story Parchment* hardly supports that proposition. *Story Parchment* did not discuss the issue of liability to any significant degree, and it recognized the distinction between proof of liability and proof of damages, *see Id.*, at 562, as have other decisions of this Court.

D. The Lower Courts Correctly Recognized A Utility's Obligation To Consider The Anticompetitive Impact Of Its Dual Rate Structure In Determining The Level Of Its Federal Rates.

Petitioners' attack on the lower courts' interpretation of Section 205(b) of the Federal Power Act, 16 U.S.C. § 824d(b), rests on the mistaken claim that the court of appeals construed that provision to obligate "utilities to limit their applications for federal rate increases to the level of rates previously allowed by state agencies." Question B, Petitioners' Br. at 6; *see also* Petitioners Br. at 27-28.

The district court's "limited *Conway* finding" *Misawaka II*, at 14a,[16] is not nearly as rigid as petitioners contend. Fairly read, the obligation found by the lower courts is simply to compare the relationship of their retail rates with the comparable wholesale rates petitioners are considering filing and putting into effect; to consider the possible anticompetitive consequences of any disparities between these wholesale and retail rates; and to avoid such disparities where possible or, at least, to satisfy themselves that such disparities are necessary and can be justified by the factors that go into the petitioners' rate determination in the first instance. This is not an onerous obligation. It allows petitioners to file and put into effect any federal rate they believe is warranted, provided they have satisfied themselves that the resultant rate disparities are necessary and justifiable.

An examination of the opinions below shows that the district court's holding does not require that the utility's federal rates must be "governed" by the state-approved

---

[16] Both the district court and the court of appeals referred to the interpretation of Section 205(b) of the Federal Power Act as a "*Conway* obligation", since the interpretation follows from this Court's decision in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976).

rates, and that the court of appeals clearly sanctioned no such result. Although the court of appeals did not discuss the point at length, it is quite clear that it did not understand the trial court to have ruled that Section 205 requires a utility to restrict its federal rates to the level of the state-approved rates. For example, in describing the disrtict court's holding, the Seventh Circuit noted that the Section 205 violation arose from the utility's practice of filing "for the highest rate it thought it could justify *without any regard for the adverse competitive impact the new wholesale rate would have on the utility's wholesale municipal customers in competition with the utility at retail*, 13a (emphasis added), and noted that there is a utility obligation "to avoid *unreasonable* differences in rates between classes of service." 14a (emphasis added). The court subsequently described petitioners' violation to arise from "failing to weigh in advance the discriminatory effects of its differences in wholesale and retail rates," 15a-16a, not simply from creating those disparities.

The Seventh Circuit did not sanction an interpretation of the Federal Power Act that presumes parity between state and federal rates. Indeed, it specifically recognized that different regulatory standards might apply to these rates, 18a, 26a-27a, and vacated the portion of the district court's injunction prohibiting petitioners from charging a wholesale rate higher than the comparable retail unless and until approved by the FERC, concluding that requiring even that temporary parity was impermissible. See 35a-36a.[17]

---

[17] That portion of the district court's injunction is set forth in the court of appeals decision, 34a, n.18. Clearly, the district court did not seek to impose the kind of *Conway* obligation that petitioners describe either. Its opinion explained that the injunction was designed to present I&M from putting into effect a wholesale rate higher than the comparable retail rate "unless and until the Federal Energy Regulatory Commis-

The "*Conway* obligation" recognized by the courts below is found on the face of Section 205(b) of the Federal Power Act, 16 U.S.C. § 824d(b), as interpreted by this Court in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976). The Seventh Circuit's ruling is correct, and reflects both the "broadly procompetitive purposes" of Section 205, *Conway Corp.* v. *Federal Power Commission*, 510 F.2d 1264, 1271 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976); *Otter Tail*, *supra*, 410 U.S. at 374, and the Seventh Circuit's recognition that the "antitrust and regulatory regimes accommodate and supplement each other in order to prove full protection from anticompetitive practices." *Mishawaka I*, 173a.[18]

---

sion determines that the wholesale rate is just and reasonable," 91a, thus recognizing that a higher wholesale rate might be permitted if properly justified. Similarly, the district court articulated the *Conway* obligation to be only to compare the wholesale and retail rates "and not require any of the plaintiffs to pay more at wholesale that it would pay under I&M's retail rates then in effect *without justifying the higher wholesale rates*," and spoke of "try[ing] to avoid *or, at a minimum, justify* any anticompetitive consequences that the defendants claim cannot be avoided." 58a (emphasis added).

[18] This obligation is important in view of the nature of the federal regulatory process. As petitioners have stated, the statutory reasonableness of their rates is "an abstract quality represented by an area rather than a pinpoint." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, *supra*, 341 U.S. at 251. Thus, in filing a rate increase, petitioners have a range of arguably permissible rates they might file, not a single rate. The FERC process is time-consuming, and the Commission does not determine the justness and reasonableness of petitioners' wholesale rates until a substantial time after they have been filed and put into effect. During this period, petitioners are the sole arbiters of their wholesale rate practices which, as the lower courts recognized, are effectively unregulated. Thus, it is important that petitioners at least consider the possible anticompetitive

Section 205(b) of the Federal Power Act prohibits public utilities from "subject[ing] any person to any undue prejudice or disadvantage" or "maintain[ing] any unreasonable difference in rates," 16 U.S.C. § 824d(b).[19] This Court's decision in *Conway* was based on its determination that the obligation to avoid any "unreasonable difference in rates" encompassed a duty to avoid such discrimination between wholesale and retail rates. *Federal Power Commission* v. *Conway Corp., supra,* 426 U.S. at 277-279; *see also, Conway Corp.* v. *Federal Power Commission, supra,* 510 F.2d at 1270-1272. Thus, the Court ruled that the Commission has jurisdiction to consider the relationship between federally-regulated wholesale rates and state-regulated retail rates when determining the propriety of the former.

The *Conway* Court determined the scope of the Commission's jurisdiction by reference to Section 205(b), a statute that imposes obligations in the first instance on the public utility. The Commission's grant of authority is to enforce "[t]he prohibition against discriminatory or preferential rates or services imposed by § 205(b) . . . ." 426 U.S. at 276, which provides that "[*n*]*o public utility* shall . . . (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or advantage, or (2) maintain any unreasonable difference in rates . . . ." 16 U.S.C. § 824d(b) (emphasis added). Thus, although the pre-

---

consequences of their actions, and assure themselves that those consequences are necessary and justifiable before proceeding.

[19] Section 205(b), 16 U.S.C. § 824(b), provides as follows:

> (b) no public utility shall, with respect to any transmission or sale subject to the jurisdiction of the commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any

cise holding in *Conway* relates to the reach of the Commission's jurisdiction, its conclusion that the "undue preference" and "unreasonable difference in rates" provisions of Section 205(b) encompass unreasonable differences between wholesale and retail rates defines the duties and obligations of a public utility subject to Commission jurisdiction. The decision below is thus consistent with this Court's *Conway* decision, and is correct.[20]

E. The Court Of Appeals Correctly Awarded The Respondent Municipalities Their Litigation Expenses In Resisting Petitioners' Threats To Their Power Supply.

Petitioners' last question, Petitioners Br. at 6, was not presented or urged below in opposition to the respondent municipalities' successful cross-appeal in the Seventh Circuit. Indeed, this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), appears in none of petitioners' briefs or arguments in the district court or the court of appeals. As a general rule, this alone requires denial of their attempt

---

unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes or service.

[20] This is not "an avulsive change in the law," Petitioners' Br. at 28, n.*. Section 205 of the Power Act was a central part of I&M's obligations for many years prior to the period at issue in this litigation, and the relevant interpretation of that section by the United States Court of Appeals for the District of Columbia Circuit was issued on April 4, 1975, more than a year prior to petitioners' filing of the 1976 wholesale rate. *See* Finding 33, 120a-121a. The evidence clearly indicated that at no point—not even after this Court's subsequent affirmance of the D.C. Circuit's decision—did petitioners ever examine the relationship between I&M's wholesale and retail rates and attempt to avoid or mitigate or justify the anticompetitive consequences resulting from that relationship. 58a. Indeed, they even made no attempt to justify those disparities at trial. *Id.*

to raise the issue for the first time in this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *see also NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975) (issue raised in the court of appeals but not discussed in its opinion not considered by this Court.).

In any event *Alyeska* does not discredit the decision below. In *Alyeska*, the Court ruled that the "private attorney general" concept could not be relied on as a basis for awarding attorney's fees to successful litigants against the United States in the absence of statutory authority. The Court recognized a number of situations in which fees are appropriate, however, including cases in which the defendant has acted in bad faith or for oppressive reasons, *see* 421 U.S. at 259, and courts have subsequently recognized that the "American Rule" applied in *Alyeska* does not preclude an award of litigation expenses, including attorney's fees, which are part of the damages resulting from a defendant's wrongful conduct. *Scott* v. *Local 377, Intnl. Brotherhood of Teamsters*, 548 F.2d 1244, 1246 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977); *see also Vaughan* v. *Atkinson*, 369 U.S. 527 (1962).[21]

---

[21] The cases cited by petitioners to support their assertion that the Seventh Circuit decision is in derogation of the American Rule are at best inapposite. *Roadway Express, Inc.* v. *Piper*, 48 U.S.L.W. 4836 (June 23, 1980), holds that even after *Alyeska* federal courts have the power to include an award of attorney's fees as part of a sanction on a party. *Id.* at 4839-40. To this extent, *Roadway* supports respondents' position. Factually, however, it is far afield, involving federal courts' power to sanction "lawyers who unreasonably extend court proceedings" under 28 U.S.C. §§ 1920, 1927, Federal Rule of Civil Procedure 37, and inherent judicial authority to regulate litigation practices. *Id.*, at 4837. *Hampton* v. *Hanrahan*, 100 S.Ct. 1987 (1980), is wholly inapposite. It held that attorney's fees may not be awarded under the Civil Rights Attorneys Fees Act when the plaintiffs' directed

In this case, petitioners contend that the accepted principle allowing consideration of attorney's fees as an element of damages in antitrust-patent litigation, *see, e.g.*, *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 878 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *Dairy Foods Inc.* v. *Dairy Maid Products Cooperative*, 297 F.2d 805, 808-809 (7th Cir. 1961), should not be applied here because the litigation expenses were "voluntarily incurred." Petitioners' Br. at 30. Once again, however, petitioners' premise is inconsistent with the record below. As the Seventh Circuit noted, "The trial court found that the municipalities *had no choice* but to file an administrative action before the commission to prevent the loss of their wholesale power source and to establish their right to equal treatment with the utility's retail customers whom the utility had indicated would receive preferences." 32a. *See also City of Mishawaka*, at 59a. These threats to the municipalities power supply were found to be part of the petitioners' overall plan of antitrust violations, and both the district court and the court of appeals considered the petitioners' purported excuses for these unjustified threats to be totally fictional. See 16a-17a.

Apart from the mistaken assertion that the litigation expenses were voluntarily incurred, petitioners offer no precedent or reasoned argument for limiting the antitrust patent cases in the manner they urge, and the Seventh Circuit's rejection of their stilted formalism is well reasoned and sound. 31a-32a. The award of the municipalities' cost of administrative litigation costs, including attorneys fees, is not inconsistent with *Alyeska* and indeed

---

verdict at trial is reversed and remanded on appeal, and the new proceedings have not yet determined who is the "prevailing party." *Id.*, at 1988. The litigation costs at issue in this case were not awarded respondents as a "prevailing party," and no similar *de novo* proceedings are pending in this case.

falls within the established exception to the "American Rule" noted above.

IV. CONCLUSION

For the reasons stated above, certiorari should be denied.

Respectfully submitted,

THOMAS R. EWALD
1000 Potomac St., N.W.
Washington, D.C. 20007
(202) 333-5533

GERALD M. STERN
DAVID R. BOYD
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

Counsel for Respondents

Of Counsel:

JAMES J. OLSON
JOHN M. RIGBY
THEODORE M. BENDALL
JAMES R. FLECK
EDWARD A. CHAPLEAU

July 30, 1980

FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

No. 79-2059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY, Corporations,
Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA, Municipal Corporations,
Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

Of Counsel:

JAMES J. OLSON
JOHN M. RIGBY
THEODORE M. BENDALL
JAMES R. FLECK
EDWARD A. CHAPLEAU

THOMAS R. EWALD
1000 Potomac St., N.W.
Washington, D.C. 20007
(202) 333-5533

GERALD M. STERN
DAVID R. BOYD
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

Counsel for Respondents

September 12, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

City of Groton, et al. v. *Connecticut Light & Power Co.*, Civil No. 15,609 ..... 1, 2, 3

City of Mishawaka, Indiana, et al. v. *American Electric Power Company, Inc., et al.*, 616 F.2d 976 (7th Cir. 1980) [*Mishawaka II*] 2

City of Newark v. *Delmarva Power & Light Co.*, 467 F.Supp. 763 (D. Del. 1979) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2059

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY, Corporations,
Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA, Municipal Corporations,
Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

On September 8, 1980, Petitioners filed a Supplemental Brief to call attention to the August 27, 1980 decision of the United States District Court for the District of Connecticut in *City of Groton* v. *Connecticut Light & Power Co.*, Civil No. 15,609. Petitioners erroneously suggest that this recent decision is in conflict with the Sev-

enth Circuit's decision in the instant case—*Mishawaka II*.[1] This suggested conflict is surprising, since the District Court in *City of Groton* relied on the principles of *Mishawaka II*, *see* 20 SA,[2] and found no conflict between its decision and that of the Seventh Circuit. *City of Groton* thus confirms Respondents' initial claim that "the unique facts" on which *Mishawaka II* rests "will prove difficult to duplicate in other antitrust cases . . . ." Respondent's Brief at 6.

1. Petitioners claim that the *City of Groton* decision is "diametrically opposed to the analysis and the result in *Mishawaka II*." Petitioners' Supplemental Brief at 3, citing 19 SA. But Petitioners fail to mention that the District Court in *City of Groton* specifically found that the "particular aspects of the rates" at issue in that case "were not so devoid of reasonableness as to justify the inference that they were intended to enhance [the utility's] alleged monopoly power." SA 20, citing *Mishawaka II*, 616 F.2d at 885. The mere fact that the "particular aspects of the rates" in *City of Groton* differed from those at issue here does not establish a conflict worthy of review by this Court. To the contrary, *City of Groton* demonstrates that the lower federal courts are quite capable of determining when *specific facts* justify the inference that *specific rates* are so devoid of reasonableness as to justify the inference of intent to serve monopolistic purposes.[3]

---

[1] Of course, a conflict between a decision of a district court and a decision of a court of appeals is normally accorded little, if any, weight by this Court in determining whether to grant a writ of certiorari.

[2] Petitioner's Supplemental Appendix reproducing the *City of Groton* decision is cited herein as "SA".

[3] Petitioners claim that *City of Groton* "recognizes" a split of authority between *Mishawaka II* and *City of Newark* v. *Delmarva Power & Light Co.*, 467 F.Supp. 763 (D.Del. 1979), "over whether [the antitrust court] should even consider the merits of the price

2. For similar reasons *City of Groton* does not warrant a grant of certiorari to review the award of attorneys fees in this case. *See* Petitioners' Supplemental Brief at 4. The Court in *City of Groton* declined to exercise its *equitable powers* to award to the *defendants* attorneys fees incurred in connection with the *defense of the litigation.* 33-35 SA. In the instant case the Court of Appeals awarded *plaintiffs* the fees they incurred in litigating before the Federal Power Commission precisely because those fees were an element of the antitrust damages suffered by the plaintiffs. *City of Groton* is thus totally inapposite with respect to the attorneys fee question at issue here.

CONCLUSION

For the reasons stated above, certiorari should be denied.

Respectfully submitted,

Of Counsel:

JAMES J. OLSON
JOHN M. RIGBY
THEODORE M. BENDALL
JAMES R. FLECK
EDWARD A. CHAPLEAU

THOMAS R. EWALD
1000 Potomac St., N.W.
Washington, D.C. 20007
(202) 333-5533

GERALD M. STERN
DAVID R. BOYD
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

Counsel for Respondents

September 12, 1980

---

squeeze claim where both the wholesale and resale prices are completely regulated by government agencies." Petitioners' Supplemental Brief at 3, *quoting* 30 SA n.19. But *City of Groton* simply noted that there "appeared" to be a split of authority and declined to resolve the issue. 30 SA n.19. This alleged "split of authority" between decisions of a Court of Appeals and a District Court, which was not noted in Petitioners' initial Brief, is certainly not grounds for grant of a writ of certiorari.

No. 79-2059

Supreme Court, U. S.
FILED
AUG 19 1980
DAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal Corporations,

Respondents.

PETITIONERS' REPLY BRIEF

WHITNEY NORTH SEYMOUR
WILLIAM J. MANNING
Counsel for Petitioners
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Of Counsel:
SIMPSON THACHER & BARTLETT
One Battery Park Plaza
New York, New York 10004
(212) 483-9000
LIVINGSTON, DILDINE, HAYNIE & YODER
425 Lincoln Bank Tower
Fort Wayne, Indiana 46802
(219) 423-9411

August 19, 1980

TABLE OF CONTENTS

	PAGE
1. As to the novelty and impact of the holdings below	2
2. As to the burdens on antitrust courts and utilities	3
3. As to a federal refund constituting a monopolistic overcharge	4
4. As to the paramount importance of the rate issues	5
5. As to the *Noerr-Pennington* issues	6
6. As to the exclusive jurisdiction issues	7
7. As to the "state action" exemption	8
8. As to the award of "litigation expenses" as part of a treble damage recovery	9
Conclusion	10

TABLE OF AUTHORITIES

PAGE

Cases:

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 9

City of Mishawaka v. *American Electric Power Company, Inc.*, 616 F.2d 976 (7th Cir. 1980) [*Mishawaka II*] ..... 3, 4, 5, 6, *passim*

City of Mishawaka v. *Indiana & Michigan Electric Company*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978) [*Mishawaka I*] 7, 8

FPC v. *Conway Corp.*, 426 U.S. 271 (1976) 2, 4, 9

Parker v. *Brown*, 317 U.S. 341 (1943) 5, 9

United Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 7

Wilmorite, Inc. v. *Eagen Real Estate, Inc.*, 454 F. Supp. 1124 (N.D.N.Y. 1977), *aff'd without opinion*, 578 F.2d 1372 (2d Cir.), *cert. denied*, 439 U.S. 983 (1978) 7

Miscellaneous Material:

Brief for the United States as Amicus Curiae, *Indiana & Michigan Electric Co.* v. *City of Mishawaka*, 436 U.S. 922 (1978) 8, 9

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-2059

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal Corporations,

Respondents.

PETITIONERS' REPLY BRIEF

1. As to the novelty and impact of the holdings below

Stripped of its rhetoric, Respondents' Brief in Opposition supports Petitioners' view that the courts below have announced novel rules of general applicability and overwhelming importance to the electric utility industry, rules that will affect the rate-making decisions of every utility which must petition the Federal Commission for cost-justified rate increases.

Respondents would extol "the value of these decisions in alerting electric utility companies to the risks of monopolistic behavior . . . ." Respondents' Brief 19. Now that utilities have been alerted, they say, to the risk that federal rate petitions may engender liability under both the antitrust laws as well as the Federal Power Act despite scrupulous adherence by the utilities to the rules and regulations of the Federal Commission, all utilities will be able to comply easily and willingly with the extra-regulatory procedures imposed by the courts below, with the result that these issues will never arise again and this Court need never scrutinize them. Respondents' Brief 19. If, as Respondents argue, the newly created risk of antitrust liability assures that every federal rate petition will henceforth comply with the Seventh Circuit's first impression interpretations of the Federal Power Act, the Sherman Act and this Court's *Conway* decision,* the effect of the decisions below is certainly far-reaching and immediate. The argument that this case will apply generally as a deterrent cannot be squared, however, with Respondents' conflicting assurances that this case is of narrow interest by reason of its "unique facts". Respondents' Brief 6. The pendency of at least ten other "price squeeze" actions also arising in the electric utility

* *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976).

industry (Petition 12 n.) and the pendency of numerous "price squeeze" claims before the Federal Commission clearly indicate that *Mishawaka II* raises issues of broad significance. Indeed, review is needed precisely because the rules of law announced below affect directly the rate mechanisms of an entire regulated industry and because, unless reviewed and rejected by this Court, every utility will be at peril to attempt to comply with them.

2. As to the burdens on antitrust courts and utilities

Respondents urge that the newly created obligation to tailor federal rates to the level of state rates, or to "justify" the difference (by some means additional to the cost of service studies required by the Federal Commission), is a simple procedure that is "not onerous" (Respondents' Brief 19, 23), and that therefore the issues raised in the Petition are of transient interest. Respondents would have this Court believe that antitrust courts will not be faced with questions as to the sufficiency of a utility's compliance with those obligations. But serious questions clearly remain. For example, what rates should a utility compare in considering the impact upon competition of rates that are otherwise cost-justified (the rates compared in the only "price squeeze" evidence adduced below were held to be not comparable as a matter of law); what constitutes "justification" for a federally accepted rate that may be higher than a state rate (the cost of service studies required by the Federal Commission were obviously deemed insufficient justification below); and to what extent may the federal filing requirements be overridden by this new standard created by an antitrust court in derogation of the existing regulatory scheme created by Congress? Respondents' argument that, under *Mishawaka II*, utilities may avoid

antitrust liability merely by "satisfy[ing] themselves" that rate disparities are "necessary and can be justified" (Respondents' Brief 23) finds no support in *Mishawaka II*, either at the page cited by Respondents (14a) or elsewhere. *Cf.* 13a, 19a-20a.

The new rate filing requirements announced by the courts below impose on electric utilities a further burden, both onerous and unfair, in that any utility which foregoes seeking a portion of the full rate relief justified by cost of service studies, in order to avoid the risk of antitrust liability, loses for all time the right to claim the difference. *See* Petition 22. Moreover, since the Federal Commission has no power to grant an increase higher than the increase sought by the utility (*see* Petition 22), the restriction on utility petitions for rate relief imposed by the courts below necessarily limits the Federal Commission's power even to consider the full measure of rate relief justified by cost of service studies.

3. As to a federal refund constituting a monopolistic overcharge

Respondents' Brief treats this case as though it dealt solely with an anticompetitive "price squeeze" of the *Conway* type (*i.e.*, the difference between federally and state regulated rates), although *Mishawaka II* held that the assumptions which underlay the only evidence offered to show a "price squeeze" were "totally without foundation" (26a-27a). Respondents thus attempt to evade the ramifications of applying a "monopolistic overcharge" theory to an industry in which pervasive regulation of rates assures that no utility "monopolist" will have the power to control prices—the *sine qua non* of a "monopolistic overcharge" case. Respondents' entire discussion of what

Mishawaka II says (Respondents' Brief 14-15) glosses over the fundamental and conceptual problem of treating refunds under the Federal Power Act as "monopolistic overcharges" under the antitrust laws. *See* 28a. Respondents understandably dismiss in a footnote the clear holding of *Mishawaka II* that antitrust injury and damages both arise and flow from the monopolistic overcharge. *Compare* Respondents' Brief 14 n.9 *with Mishawaka II,* 27a, 29a-30a. They ignore the consequences such a holding has on the electric utility industry and on the statutory scheme enacted by Congress for its regulation.

4. As to the paramount importance of the rate issues

Respondents criticize Petitioners for seeking to "isolate their rate practices from their other anticompetitive acts and practices . . . ." Respondents' Brief 2. To the extent that the Petitioners have done that, it was to emphasize that regulated rates are the crux of this controversy, and that they cannot be mixed in a "monopoly broth" (*see* 24a) without separate consideration of the constitutional and regulatory protections surrounding them, as well as of the nature of the utility's "monopoly" insofar as rates are concerned. The regulated rate issues are properly highlighted because in no case decided by this Court has a determination been made (1) as to the applicability of the *Noerr-Pennington* doctrine to federal petitions for rate increases, (2) as to the existence of a direct and unavoidable conflict between the Sherman Act and the ratemaking jurisdiction of the Federal Commission under the Federal Power Act, or (3) as to the existence or the scope of a state action defense, under *Parker* v. *Brown,* 317 U.S. 341 (1943), to allegations of a "price squeeze"

created by the action of state regulatory agencies in lowering the rates sought by a utility. These rate-related issues are also central to the result and to the holdings below, because *Mishawaka II* expressly states that Petitioners' other acts would not in themselves amount to an antitrust violation. 22a, 23a-24a.

5. As to the *Noerr-Pennington* issues

Respondents treat this Court's *Noerr-Pennington* doctrine as one of statutory construction, and proceed to invoke the presumption against "implied repeal". Respondents' Brief 11-13. In so doing, Respondents confuse a constitutional limitation on congressional power with an implied repeal based on congressional intent.* *Noerr-Pennington* is not a statutory but a constitutional doctrine, founded in the basic right to petition government for a redress of grievances, guaranteed by the First Amendment. In urging a narrow scope for the protection of the *Noerr-Pennington* doctrine, one that would exclude the rate filings at issue, Respondents part company with the decision they are seeking to uphold. *Mishawaka II* concedes the applicability of the doctrine *ab initio,* but declines to apply it because of the "combination" of the rate petition filings with other acts that in its view were not constitutionally protected. 17a.** Respondents gloss over the amalgamation of pro-

* That confusion also infects Respondents' Brief at 9 n.5.

** The courts below also declined to apply the *Noerr-Pennington* doctrine to Petitioners' non-sham petitions for rate relief because in its view Petitioners did not comply with an obligation, first announced in the courts below, that utilities govern their filings by competitive considerations. Accordingly, the courts below found that Petitioners had violated the Federal Power Act (13a, 15a-16a), a statute which confides exclusive enforcement powers to the Federal Commission. That result reflects an erroneous assumption that the First Amendment, which limits the scope of the Sherman Act under the *Noerr-Pennington* doctrine, is somehow less applicable to the scope of the Federal Power Act.

tected and unprotected acts, explicitly barred by *United Mine Workers* v. *Pennington,* 381 U.S. 657, 670 (1965), by baldly asserting that, in "regulated entity" cases, *Noerr*-protected acts lose their constitutional protection when unprotected anticompetitive acts are also shown. Respondents' Brief 11 n.6. However, the only case they cite for that proposition, *Wilmorite, Inc.* v. *Eagen Real Estate, Inc.,* 454 F. Supp. 1124, 1136(N.D.N.Y. 1977), *aff'd without opinion,* 578 F.2d 1372 (2d Cir.), *cert. denied,* 439 U.S. 983 (1978), arose from a zoning dispute involving the development of shopping malls (a non-regulated industry), and the *dictum* from that case on which Respondents rely does no more than loosely characterize the holdings of *other* cases, on which Respondents obviously prefer not to rely. Indeed, in *Wilmorite,* the court dismissed the complaint on *Noerr-Pennington* grounds; that case does not in any way contradict Petitioners' analysis of that doctrine.

6. As to the exclusive jurisdiction issues

Respondents imply that this Court's refusal to grant certiorari to review the preliminary jurisdictional motion in *Mishawaka I* militates against such review now. Respondents' Brief 13. First, the denial of certiorari had no determinative or other significance; second, there has now been developed a full record after a trial in which Respondents chose to proceed on a theory which is different from the theory involved in *Mishawaka I* and which creates a sharper clash between the Sherman Act and the regulatory scheme.

It is therefore inappropriate for the Respondents to suggest that the Solicitor General's recommendation that certiorari be denied in *Mishawaka I* should be adopted on

this Petition, in the absence of any further view from the Solicitor General. Indeed, the disposition of this case in *Mishawaka II* is in direct conflict with at least some of the views expressed in the Solicitor General's Brief for the United States as Amicus Curiae in this Court's Docket No. 77-689. For example, the Solicitor General presented the "price squeeze" views of the Federal Commission as follows:

> "If, in its pending proceeding, the Commission were to conclude under *Conway* that the differential between wholesale and retail rates is justifiable and not the product of anticompetitive manipulation, and therefore approved the wholesale rate as just and reasonable, established ratemaking principles indicate to the Commission that a court would be bound by such a determination."

Brief for the United States as Amicus Curiae at 18, *Indiana & Michigan Electric Co.* v. *City of Mishawaka,* 436 U.S. 922 (1978). The decisions below are at war with that position.

The Solicitor General's Brief on *Mishawaka I* dealt solely with the "price squeeze" claim of the original complaint. The Solicitor General did not address the narrower issue of whether or not a federal court, acting under the antitrust laws, may regulate the level, the cost justification and the justness and reasonableness of rates sought on rate petitions to regulatory agencies.

7. As to the "state action" exemption

Respondents place major reliance on their argument that the "state action" exemption does not apply here because neither the State of Indiana nor the State of Michigan has

sanctioned a "price squeeze". Respondents' Brief 20-21. Petitioners made no claim that a "price squeeze" was so sanctioned. Rather, Petitioners submit that it was the action of the state commissions, not of the Petitioners, which created any differentials between federal and state rates—the differentials which ground the "price squeeze" claim—by granting rate relief at a level lower than that sought by Petitioners. The Petition (at 26-27) reflects the view previously expressed in the Solicitor General's Brief (at 14 n.5) that, if this is a *Conway* "price squeeze" case, the actions taken by the state commissions might be shown at trial to have constituted "state action" within the meaning of *Parker* v. *Brown, supra.* The record and the opinion in *Mishawaka II* (28a n.16) establish that Petitioners have met this burden, and this crucial issue of nationwide importance is now ready for consideration by this Court.

8. As to the award of "litigation expenses" as part of a treble damage recovery

Respondents claim that Petitioners failed to cite *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), to the court below, and that Petitioners' attempt to obtain review here of the Seventh Circuit's award of administrative "litigation expenses" as treble damages is therefore precluded. Respondents' Brief 27-28. There is no such rule. Petitioners squarely addressed the issue in their brief on Respondents' cross-appeal. Petitioners addressed the issue again on their petition for rehearing in the Seventh Circuit and there cited *Alyeska* and relied upon it.

We believe *Alyeska* governs the result here. Congress made no provision in the Federal Power Act for the award

of attorneys' fees to any party in proceedings before the Federal Commission. In this case, "litigation expenses" in proceedings that have not yet been finally determined by the Federal Commission were awarded as treble damages. The argument made by Respondents is nothing more than an attempt to obtain by indirection a treble damage recovery for "litigation expenses" incurred in proceedings conducted pursuant to a statute which provides no authority even for a single recovery.

Conclusion

Based on all of the foregoing, Petitioners respectfully pray that their Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

WHITNEY NORTH SEYMOUR
WILLIAM J. MANNING
Counsel for Petitioners
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Of Counsel:
SIMPSON THACHER & BARTLETT
LIVINGSTON, DILDINE, HAYNIE & YODER

August 19, 1980

No. 79-2059

IN THE

Supreme Court of the United States

October Term, 1979

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal Corporations,

Respondents.

PETITIONERS' BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

WHITNEY NORTH SEYMOUR
WILLIAM J. MANNING
Counsel for Petitioners
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Of Counsel:
SIMPSON THACHER & BARTLETT
One Battery Park Plaza
New York, New York 10004
(212) 483-9000
LIVINGSTON, DILDINE, HAYNIE & YODER
425 Lincoln Bank Tower
Fort Wayne, Indiana 46802
(219) 423-9411

December 31, 1980

TABLE OF CONTENTS

PAGE

Discussion 2

Conclusion 9

Appendix

TABLE OF AUTHORITIES

Cases:

Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U.S. 679 (1923) 4, 5, 9

City of Groton v. Connecticut Light & Power Co., Civ. No. 15,609 (D. Conn. Aug. 26, 1980) 8

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 9

FPC v. Conway Corp., 426 U.S. 271 (1976) 3

Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) 9

Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156 (1922) 3, 4, 9

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) 3, 4, 8, 9

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 2

Parker v. Brown, 317 U.S. 341 (1943) 5, 7, 9

United Mine Workers v. Pennington, 381 U.S. 657 (1965) 5, 9

United States v. National Association of Securities Dealers, 422 U.S. 694 (1975) 9

No. 79-2059

IN THE

Supreme Court of the United States

October Term, 1979

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal Corporations,

Respondents.

PETITIONERS' BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

Pursuant to Rule 24(5) of this Court, Petitioners file this Supplemental Brief in support of their Petition for a Writ of Certiorari to the United States Court of Appeals

for the Seventh Circuit and in response to the Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae ("Amici's Brief"), filed on December 15, 1980.*

Discussion

The ultimate question presented by this Petition is whether trials of Section 2 cases in the federal courts furnish the appropriate theatre for the resolution of disputes over electric rates regulated by federal and state agencies. This Petition urges review of the first appellate decision to superimpose monopoly principles on such regulated electric rates, and of the conflicts, incongruities and inconsistencies engendered by the invocation of antitrust formulae in collateral review of administrative determinations. The Amici's Brief surprisingly argues that "settled principles" of antitrust law are fully appropriate to resolve electric rate disputes, that the decision below was in accord with such settled principles, and that review is therefore unnecessary. The imprimatur of the government on the procedures employed and the doctrines created in the decision below underlines the urgency of review by this Court.

The fundamental issue of whether the reach of the antitrust laws extends to regulated electric rates was left undecided by this Court's four-to-three decision in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973);** and

* The information required by this Court's Rule 28.1 appears in the Appendix to this Brief.

** While the utility in *Otter Tail* was required to furnish "wheeling" services to a competitor, the decree directed that such service be paid for at a compensatory rate to be fixed by the Federal Commission. 410 U.S. at 375-77.

in *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976), this Court held that the Federal Commission had jurisdiction to (and must) consider "price squeeze" allegations as part of the administrative process. It is therefore far from settled law that an award of antitrust damages for a "monopolistic overcharge" or "price squeeze" claim may be predicated on regulated electric rates, or on petitions for changes in such rates or on the grant or denial of such petitions. Indeed, the imposition of any award of antitrust damages, large or small, effects a reduction, by indirection, in the rates determined by the regulatory bodies, and thus conflicts with the "filed rate" doctrine emphatically articulated by this Court:

> Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, *whether fixed or merely accepted by the Commission,* and not even a court can authorize commerce in the commodity on other terms.

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951) (emphasis added); *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156, 162 (1922).

The Seventh Circuit did not find "settled principles" at hand to deal with this case. To the contrary, the Seventh Circuit conceded that multiple regulation of a utility by federal and state regulatory agencies and by the Sherman Act "generates legal and practical problems in addition

to electricity'' (Pet. App. 8a) and that, ''[a]t best,'' a utility subject to three overlapping schema of regulation ''may find itself in a legal and practical maze, . . .'' (Pet. App. 18a). The decision below found that existing principles were inadequate to guide the courts through the legal maze: ''The necessary resolution by the courts of the involved complexities does not render a totally satisfying result.'' Pet. App. 8a.

To the extent that any settled principles were available, they were to be found in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), and *Bluefield Water Works & Improvement Co.* v. *Public Service Commission*, 262 U.S. 679 (1923). The Seventh Circuit was compelled to chart new paths largely because it failed to follow these cases or even to recognize that they are guideposts as applicable to antitrust as to other claims.

On the *Noerr-Pennington* issue, the Amici's Brief construes the decision below as holding that the doctrine is simply inapplicable to rate relief filings made under a statute that provides for the collection of requested rates subject to refund. Amici's Br. 8-9. The Amici's Brief argues (at 8) that, while the First Amendment right of petition may be ''implicated ultimately,'' it does not protect the petitioning process itself; we would have thought, however, that the very first utterance, the lodging of the petition for rate relief, would be the protected act to which the constitutional right would have attached. It is impossible to divine from the Amici's Brief what event other

than the filing of the petition would awaken the constitutional protection of the *Noerr-Pennington* doctrine.*

The Amici's *Noerr-Pennington* analysis contradicts the holding below that I&M's filings were non-sham petitions to government within the meaning of the *Noerr-Pennington* doctrine (Pet. App. 13a); the Seventh Circuit nevertheless declined to dismiss on that ground because it held that the doctrine is inapplicable in a context of other exclusionary acts (Pet. App. 17a), a holding which is contrary to this Court's expressed view in *United Mine Workers* v. *Pennington,* 381 U.S. 657, 670 (1965). To support the result reached below, the Amici were compelled to remove rate filing petitions from the protective mantle of *Noerr-Pennington,* even though the exercise of the right of petition in the electric utility industry is the sole permissible avenue for securing a utility's Fifth Amendment right to a fair return on investment. *See Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U.S. 679 (1923). Since the application of the *Noerr-Pennington* doctrine would mandate dismissal of the decision below, the abatement of the very Constitutional rights that the doctrine protects becomes an indispensable preliminary to the Amici's consideration of the further holdings below.

In this action, it is conceded that I&M sought the full rate relief that it believed it could justify under the applicable regulatory rules. Pet. App. 119-20a (Finding 32). There is no finding and no claim that I&M sought any more. Yet the Seventh Circuit and the Amici conclude that a

* The Amici's discussion of the *Noerr-Pennington* doctrine (at 8) turns on a distinction between "private action" and government action which is inappropriately borrowed from and confused with the "state action" analysis under *Parker* v. *Brown,* 317 U.S. 341 (1943).

specific anticompetitive intent may be derived from such rate filings and that such an intent mandates liability.

That finding of specific intent originated in the district court's blanket adoption (and photocopying) of Respondent's proposed findings. *See Pet.* 9n. That harsh and epithetical condemnation led the Court of Appeals to create a new exception to this Court's *Noerr-Pennington* doctrine and to announce new and unprecedented antitrust rulings, and continues to cloud the novel legal issues which we submit are generally applicable to the electric utility industry. Thus, the Amici would sanction the denial of *Noerr-Pennington* protection and the dismantling of the filed rate doctrine (under *Keogh* and *Montana-Dakota*) in order to sustain liability. Neither doctrine is amenable to such abbreviation, and I&M's intent or motivation should not be determinative of their validity or applicability.

One overriding consideration is entirely omitted from the Amici's attack on the Petition. Under the decision below, every time an electric utility petitions the Federal Commission for what it believes to be the maximum amount to which it is entitled under the Federal Power Act, and every time the proposed rate schedules become effective subject to refund (pursuant to Section 205 of the Federal Power Act), the risk arises that any amount disallowed by the Federal Commission, and refunded, will be labeled a "monopolistic overcharge", thus furnishing a predicate for possible antitrust liability.* Such liability attaches,

* That holding is central because (a) the sole evidence of any "price squeeze" is a rate comparison that the Seventh Circuit held inadequate even to support a rational damage calculation (*see* Pet. at 27); (b) the courts below found that I&M's rate petitions requested no more than it believed it could justify under the applicable rules and regulations (Pet. App. 119-20a); and (c) the "[a]nticom-

(footnote continued on next page)

under the decision below, even though the utility charged only the "filed rate" within the meaning of *Montana-Dakota* and *Keogh,* and even though the rate filed represented no more than what the utility believed it could justify under the applicable regulations. The Amici's Brief addresses neither the foundation for such a result nor its significance.

The impact of these doctrines on the electric utility industry cannot be blunted, as the Amici attempt, by characterizing the fact pattern in this case as unique. The findings cited as grounds for distinguishing this case from others furnish no obstacle to the litigation of rate levels in antitrust courts whenever utility customers are dissatisfied with the statutory structure, the pace or the result of the administrative process. The finding "that I&M possessed monopoly power" (Amici's Br. 11-12) does not furnish a promising ground for distinguishing cases in this industry; I&M is no more or less a "monopolist" than any other electric utility. The Amici also rely (at 12) on the finding of other "exclusionary" acts, not in themselves violative of any statute and each in turn subject to government regulation (Pet. 10-11); that finding, by its very vagueness, represents an incitement to litigation rather than a ground for distinction. Certainly, the arguments that I&M knew that

---

petitive effects from [a substantial] portion of the price squeeze, absent evidence that [I&M] deliberately depressed its [state-regulated] retail rates, must be attributed to the state regulatory commissions and not to the utility." Pet. App. 28a n. 16.

Those findings are flatly incompatible with the Amici's assertion that this case rests on "I&M's manipulation of its wholesale and retail rates" (Amici's Br. 10) and with the argument that the state action doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943) does not preclude liability on the "price squeeze" claim (Amici's Br. 10-11). Moreover, the Amici's present argument on *Parker* v. *Brown* can scarcely be said to reflect "settled principles" when it is incompatible with the views advocated in the Brief for the United States submitted in connection with I&M's 1977 Petition. *See* Pet. 26-27.

its petitions to the Federal Commission would encounter delays and hoped that its petitions would be granted in full (Amici's Br. at 7-8) provide neither a ground for distinguishing this case from any other, nor a legitimate basis for the imposition of liability in the first place.

The Amici's hope that other courts will be "perceptive" enough to ignore this case as one resting on its own unique facts (Amici's Br. at 12) casts a strange light on the argument that this case applies "settled principles". No such factual distinction was drawn in *City of Groton* v. *Connecticut Light & Power Co.*, No. 15,609 (D. Conn. Aug. 26, 1980), furnished to the Court in Petitioners' Supplemental Brief; indeed, the holding of that case would compel dismissal of this case:

> The municipalities had no legal right to receive any rate other than the rate on file with the Commission. Since they received the legal rate, they, like the carrier in *Keogh* [v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156, 162 (1922)] were not injured in their business or property. Absent such an injury they have no right of action for relief.

Pet. Supp. Br. 19SA. *See Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951) (Jackson, J.). The dismissal in *City of Groton* thus rests on a settled principle at war with the views of the Seventh Circuit and the Amici. *See* Pet. 20-21.

This Petition assembles numerous issues important to the electric utility industry as a whole, as well as to the sound and efficient administration of justice. The many district courts confronting similar complex cases have at present no substantial guidance for the application—resolution, in the context of electric rates—of the exclusive jur-

isdiction issue under *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975), and *United States* v. *National Association of Securities Dealers,* 422 U.S. 694 (1975); of the First Amendment doctrine enunciated in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight Inc.,* 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965); of the filed rate doctrine embodied in *Keogh* v. *Chicago & Northwestern Railway Co.,* 260 U.S. 156 (1922), and *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951); of the constitutional right to a fair return on investment under *Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U.S. 679 (1923); and of the state action doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943). The decision below cannot survive a ruling by this Court that any one of these principles is applicable to the electric rate filings and administrative determinations that are at the core of this case.

Conclusion

Based on all the foregoing, Petitioners respectfully pray that their Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted. Nothing in the Amici's Brief casts doubt upon the importance of the exercise of this Court's supervisory power over this case.

Respectfully submitted,

WHITNEY NORTH SEYMOUR
WILLIAM J. MANNING
Counsel for Petitioners
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Of Counsel:
SIMPSON THACHER & BARTLETT
LIVINGSTON, DILDINE, HAYNIE & YODER

APPENDIX

Appendix

Parent:* American Electric Power Company, Inc.

Affiliates and Subsidiaries:

*American Electric Power Service Corporation
Appalachian Power Company
Beech Bottom Power Company
Blackhawk Coal Company
Cardinal Operating Company
Cedal Coal Co.
Central Appalachian Coal Company
Central Coal Company
Central Ohio Coal Company
Central Operating Company
Columbus and Southern Ohio Electric Company
Franklin Real Estate Company
Indiana Franklin Realty, Inc.
Indiana-Kentucky Electric Corporation
*Indiana & Michigan Electric Company
Kanawha Valley Power Company
Kentucky Power Company
Kingsport Power Company
Michigan Electric Power Company
(Formerly Sewell Valley Utilities Co.)
Michigan Gas Exploration Company
Michigan Power Company
Ohio Power Company
Ohio Valley Electric Corporation
Price River Coal Company, Inc.
(Formerly Castlegate Coal Company, Inc.)
Southern Appalachian Coal Company
Southern Ohio Coal Company
(Formerly Captina Operating Company)
Twin Branch Railroad Company
West Virginia Power Company
Wheeling Electric Company
Windsor Power House Coal Company

* Petitioners.

No. 79-2059

DEC 15 1980

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN ELECTRIC POWER CO., INC., ET AL.,
PETITIONERS

v.

CITY OF MISHAWAKA, INDIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

WADE H. MCCREE, JR.
Solicitor General

SANFORD M. LITVACK
Assistant Attorney General

BARRY GROSSMAN
BRUCE E. FEIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JEROME NELSON
Acting General Counsel

JOHN A. CAMERON, JR.
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2059

AMERICAN ELECTRIC POWER CO., INC., ET AL.,
PETITIONERS

v.

CITY OF MISHAWAKA, INDIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

1. Whether either the *Noerr-Pennington* doctrine or the Federal Power Act shields a utility from liability under Section 2 of the Sherman Act when its unilateral wholesale and retail rate-making actions, together with other conduct, reflect a specific intent to injure competition.

2. Whether the "state action" doctrine recognized in *Parker* v. *Brown*, 317 U.S. 341 (1943), and subsequent cases protects a monopolist from liability under Section 2 of the Sherman Act for manipulating federally-regulated wholesale rates and state-regulated retail rates as part of a broader scheme to injure competition.

TABLE OF AUTHORITIES

Cases: Page

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 13
Berenyi v. *Immigration Director*, 385 U.S. 630 12
Brunswick Corp. v. *Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477 12
California v. *FPC*, 369 U.S. 482 8
California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 7
California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 ..... 9, 11
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 ..... 8, 11
City of Groton v. *Connecticut Light & Power Co.*, No. 15,609 (D. Conn. Aug. 26, 1980) 12
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 11
City of Mishawaka v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314, cert. denied, 436 U.S. 922 ..... 5, 10
Eastern R.R. Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 7
FPC v. *Conway*, 426 U.S. 271 11
Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271 12
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 2
Otter Tail Power Co. v. *United States*, 410 U.S. 366 7
Parker v. *Brown*, 317 U.S. 341 10
United Mine Workers v. *Pennington*, 381 U.S. 657 7
United States v. *Aluminum Co. of America*, 148 F.2d 416 7
United States v. *R.C.A.*, 358 U.S. 334 8

Constitution and statutes:

United States Constitution, First Amendment 8
Federal Power Act, ch. 687, Part II, 49 Stat. 847, 16 U.S.C. 824-824h 1
16 U.S.C. 824 1
16 U.S.C. 824d(c) 1

Constitution and statues—Continued Page

16 U.S.C. 824d(d) 1
16 U.S.C. 824d(e) 2
16 U.S.C. 824e(a) 2

Sherman Act, Section 2, 15 U.S.C. 2 .....3, 4, 7, 10
Pub. L. No. 95-617, Title II, 92 Stat. 3142:

Section 207(a) 1
Section 208 1

Ind. Code Ann. (Burns 1973):

§ 8-1-2-1 2
§ 8-1-2-38 2
§ 8-1-2-42 2

Mich. Stat. Ann. (1970):

§ 22.13(6) 2
§ 22.13(6a) 2

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner American Electric Power Co. (AEP) is an investor-owned public utility holding company. Petitioners American Electric Power Service Corporation and Indiana & Michigan Electric Company (I&M) are wholly owned subsidiaries of AEP (Pet. App. 107a). I&M is a public utility within the meaning of Section 201 of the Federal Power Act, ch. 687, 49 Stat. 847, 16 U.S.C. 824. It generates, transmits, and sells electric energy to both wholesale and retail customers in a service area that encompasses parts of Indiana and Michigan (*ibid.*). I&M's wholesale rates are subject to the jurisdiction of the Federal Energy Regulatory Commission (Federal Commission) pursuant to Part II of the Federal Power Act (16 U.S.C. 824-824h). Retail rates of I&M are regulated by state authorities in Indiana and Michigan.

Public utilities like petitioner I&M must file with the Federal Commission "schedules showing all [wholesale] rates and * * * all contracts which in any manner affect or relate to such rates" (16 U.S.C. 824d(c)). During the period pertinent to this litigation, I&M was required to provide 30 days' notice to the Federal Commission and the public prior to any modification of such rates or contracts (16 U.S.C. 824d(d)).[1] The Federal Commission may suspend any change in rate schedule and delay the use of a

[1] The 30-day period was extended to 60 days in 1978 by Pub. L. No. 95-617, Title II, Sections 207(a), 208, 92 Stat. 3142.

proposed rate for up to five months, and may hold a hearing "concerning the lawfulness of such rate[s]" (16 U.S.C. 824d(e)). If a hearing is not completed prior to the expiration of the five month suspension period, the proposed new schedule takes effect, but the Commission may require the utility to maintain an accurate account of amounts received by reason of the rate increase and to refund with interest any portion subsequently found "not justified" (*ibid.*).

On its own motion or on complaint, the Commission may initiate a hearing to determine whether any previously established "rate * * * or contract" is "unjust, unreasonable, unduly discriminatory or preferential," and an affirmative finding invests the Commission with authority to establish a just and reasonable rate or contract to be thereafter observed (16 U.S.C. 824e(a)). Although the Commission may disapprove existing or suspended utility rates and prescribe future rates, it may not order reparations with respect to rates that were not suspended. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951).

Petitioner I&M must file its retail electric rates with the Public Service Commissions of Indiana and Michigan. Proposed retail rates must be approved by the respective commissions prior to being placed in effect. Ind. Code Ann. §§ 8-1-2-1, 8-1-2-38, 8-1-2-42 (Burns 1973); Mich. Stat. Ann. §§ 22.13(6), 22.13 (6a) (1970). I&M retains, however, unilateral authority to propose new rates. Ind. Code Ann. § 8-1-2-42 (Burns 1973); Mich. Stat. Ann. § 22.13(6a) (1970).

Respondents are ten municipalities that operate electric distribution systems, purchase all, or nearly all, of their electric energy at wholesale from I&M,

and retail that electricity in competition with I&M (Pet. App. 110a-117a).

2. Respondents filed an antitrust action against petitioners seeking injunctive relief and damages for an alleged attempt to monopolize and monopolization of the retail sale of electric power in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. The amended complaint alleged that I&M engaged in various types of anticompetitive conduct, including a predatory price squeeze effectuated by filing with the Federal Commission wholesale rates in June 1972 and May 1976. Those rates, which applied to respondents, exceeded I&M's retail rates for industrial customers located in or near respondent's service areas. The district court [2] and the court of appeals [3] refused either to dismiss the complaint for lack of jurisdiction or to stay proceedings pending the completion of inquiries by the Federal Commission into the lawfulness of I&M's 1972 and 1976 wholesale rates. This Court denied certiorari,[4] and, on remand, the case went to trial.

The district court found that respondents operate electric utilities within the service area of I&M, that each is wholly dependent on I&M for its bulk power, that I&M possesses a monopoly in the retail sale of electric power within its service area, and that I&M competes with respondents for the patronage of all consumers residing within respondents' corporate limits (Pet. App. 48a). I&M and respondents further

---

[2] See Pet. App. 180a-199a.

[3] See *id.* at 157a-178a.

[4] 436 U.S. 922 (1978). In a brief *amicus curiae*, the United States and the Federal Commission urged that certiorari should be denied.

compete for individual customers actually located or contemplating location in each town or elsewhere in I&M's service area (*ibid.*). The district court also found (*id.* at 57a-77a) that petitioners had engaged in a series of anticompetitive and exclusionary actions with the specific intent and effect of preserving and augmenting I&M's monopoly power over retail sales of electricity. This course of conduct included (1) charging respondents unjust and unreasonable rates for wholesale electric power (rates subsequently disapproved by the Federal Commission), in excess of I&M's comparable retail rates and without cost justification; (2) disregarding obligations under the Federal Power Act to file wholesale rates only after considering their relationship with I&M's comparable retail rates and the possible anticompetitive effects caused by the wholesale-retail rate relation; and (3) repeatedly attempting to undermine respondents' source of power and competitive viability by threatening to terminate service and to impose short term, restrictive supply contracts. Accordingly, the district court concluded that petitioners had violated Section 2 of the Sherman Act through a combination of actions motivated by a specific intent to impair respondents' ability to compete, thereby maintaining or bolstering I&M's existing monopoly (Pet. App. 71a-77a). The district court rejected petitioners' contention that the *Noerr-Pennington* doctrine precluded reliance on the anticompetitive effects of I&M's wholesale and retail rate relationships to establish an antitrust violation (Pet. App. 77a-81a).

The district court awarded damages to respondents based on the difference between the unlawful wholesale rates charged by I&M and I&M's lower comparable retail rates (Pet. App. 86a-87a). In addi-

tion, the court directed petitioners in preparing and filing wholesale rates with the Federal Commission to take into account the relationship between anticipated first year billings to respondents and the billings that would result if I&M's retail rates were charged. I&M also was enjoined from charging any wholesale rate that would produce expected billings in excess of amounts that would be collected if retail rates were charged, until the Federal Commission determined that the wholesale rate was just and reasonable (Pet. App. 91a).

By a unaminous vote, the court of appeals affirmed the district court's conclusion regarding petitioners' Sherman Act liability, but vacated and remanded on issues of relief. The court of appeals noted that its prior decision in this litigation [5] had established that I&M's anticompetitive actions were subject to the Sherman Act, and that the Federal Commission had neither exclusive nor primary jurisdiction over respondents' complaint (Pet. App. 8a). The court rejected the argument that the *Noerr-Pennington* and "state action" doctrines protected petitioners from antitrust liability resting in part on the intended anticompetitive relationship of I&M's wholesale and retail rates (*id.* at 13a-23a).

The court of appeals concluded, however, that the district court had incorrectly awarded antitrust overcharge damages based on the difference between I&M's unlawfully inflated wholesale rates and the retail rates I&M was then charging. It found no support for the district court's assumption of identity between a proper new wholesale rate and the existing

---

[5] *City of Mishawaka* v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978).

retail rate. Instead, it held that the Federal Commission's refund order constituted the best measure of overcharge damages,[6] and that any other damages "should be based on proof of specific injuries suffered as a result of the utility's overcharges and other monopolistic practices" (Pet. App. 26a-30a). The court of appeals further held that respondents were entitled to damages for litigating costs incurred before the Federal Commission that were necessitated by I&M's threatened curtailment of their wholesale supply of electricity (Pet. App. 31a). The district court's injunction, which circumscribed petitioners' right to charge respondents wholesale rates in excess of comparable retail rates, was vacated and remanded for additional proceedings (*id.* at 35a-37a).

DISCUSSION

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or any other circuit. The decision applies settled principles of law to the facts of this particular case. Review by this Court is therefore unwarranted.

1. Petitioners' contention (Pet. 16-19) that the *Noerr-Pennington* doctrine forecloses antitrust scrutiny of their unilateral decisions respecting wholesale rates filed with the Federal Commission was correctly rejected by the lower courts. The *Noerr-Pennington* doctrine reflects a rule of statutory construction that declines to impute to Congress an in-

---

[6] While the present case was pending before the court of appeals, the Federal Commission was conducting proceedings to determine whether I&M's wholesale electricity rates for 1976-1978 were unjust or unreasonable. Following the court's decision, the Federal Commission determined that the rates were, in fact, unjust and unreasonable. See pages 9-10, *infra*.

tent to penalize bona fide attempts by private parties to influence public officials to make decisions that have the effect of restraining competition.[7] In such cases, of course, it is governmental action which is the proximate or direct cause of the competitive restraint. By contrast, the anticompetitive effect in this case occurred not as a result of governmental action, but from private rate filings that preceded any governmental action thereon. Indeed, it was the delay in governmental action that made it possible for I&M to injure respondents by its rate filings. It knew that its wholesale rate proposals would go into effect prior to a Federal Commission determination of their reasonableness, while its proposals for higher retail rates in all likelihood would not become effective until long after the new wholesale rates became effective. It was the anticipated postponement of regulatory action that enabled I&M to impose a price squeeze on respondents.[8]

---

[7] See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (collective activity designed to influence the passage or enforcement of laws); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-672 (1965) (collective activity to influence the Secretary of Labor in setting minimum wages and to influence officers of the TVA in coal purchasing decisions); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972) (collective activity to influence the decisions of administrative or judicial bodies); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 379-380 (1973) (unilateral decision of utility monopolist to sponsor litigation).

[8] A monopolist violates Section 2 of the Sherman Act by engaging in a price squeeze if its wholesale rates unduly impede its wholesale customers from competing with it in the retail market, and if the monopolist sets its wholesale rates with the intent to achieve that effect. See *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 436-438 (2d Cir. 1945).

In short, I&M's rate filings were designed to forestall, rather than cause, governmental action. Under the controlling statute, the filed rates became effective unless and until the Federal Commission suspended them, and I&M obviously hoped that its filings and supporting data would simply be accepted by the Commission without any suspension and investigation. Thus, I&M's rates filings were made with the clear understanding that the rates contained therein would often become effective immediately and have the effect of damaging I&M's competitors for retail business. To that extent, they were private actions intended to have a direct effect without the intervention of a governmental body. In this context, it is clear that whatever First Amendment interest may be implicated ultimately by I&M's tariff filings, that interest does not shelter petitioners from antitrust liability based on their own immediately effective rate setting activities (see Pet. App. 16a).

Moreover, petitioners' *Noerr-Pennington* argument is flatly inconsistent with *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 601-602 (1976), where this Court held that the mere fact that a regulatory body may approve a private tariff proposal does not make the proposing party's conduct immune from antitrust scrutiny under *Noerr-Pennington.* See also *California* v. *FPC*, 369 U.S. 482, 488-489 (1962); *United States* v. *R.C.A.*, 358 U.S. 334, 350-351 (1959) (private decisions to acquire assets remain subject to antitrust scrutiny even though the acquisition was contingent on regulatory approval). By focusing on the request for state approval, petitioners' *Noerr* argument would undercut this Court's repeated holding that state authorization of private restraints does not immunize the private conduct from the federal

antitrust laws. See, *e.g.*, *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Cantor* v. *Detriot Edison, supra.*[9]

2. Petitioners also argue (Pet. 20-25) that the court of appeals improperly intruded on the rate-making province of the Federal Commission by suggesting the possibility (Pet. App. 28a) that the district court might independently calculate antitrust damages ascribable to petitioners' unlawful wholesale-retail price squeeze. They assert that, if the district court undertakes this task, its action would conflict with the Federal Commission's authority to determine just and reasonable wholesale rates. That argument, however, is plainly not ripe for review. While the court of appeals indicated that the district court could make its own overcharge assessment for the 1976-1978 period based on the Federal Commission's decision that the 1972-1976 rates were unreasonable, it clearly advised the district court to defer to the Federal Commission's then pending inquiry into the reasonableness of I&M's 1976 wholesale rates (Pet. App. 27a-28a). Subsequent to the decision of the court of appeals, the Federal Commission determined that I&M's rates were unjust, unreasonable, and un-

---

[9] We assume that the *Noerr-Pennington* doctrine would preclude the imposition of antitrust liability based solely upon the filing of tariffs intended in good faith to elicit governmental action. But the charging of rates under tariffs, as part of a broader scheme to monopolize by imposition of a price squeeze, is not immune from antitrust scrutiny. As *Cantor* v. *Detroit Edison, supra,* makes clear, *conduct* undertaken pursuant to a tariff is not necessarily shielded from antitrust liability simply because the conduct is described in a tariff.

duly discriminatory.[10] The possibility that the district court will nevertheless endeavor to establish a just and reasonable wholesale rate for the 1976-1978 period in conflict with the Federal Commission's decision (despite the court of appeals' strong urging to the contrary) is wholly speculative and does not warrant review by this Court. Similarly speculative is any concern over possible injunctive relief. The court of appeals set aside the district court's injunctive order (Pet. App. 37a) and remanded with instructions to fashion a narrower decree that does not unduly infringe on the Federal Commission's rate making authority (*ibid.*).

3. Petitioners renew the contention (Pet. 25-26) advanced in I&M's petition to this Court in No. 77-689, cert. denied, 436 U.S. 922 (1978), that the court of appeals erred in refusing to hold that the Federal Power Act repeals by implication Section 2 of the Sherman Act, as it applies to I&M's manipulation of its wholesale and retail rates with a specific intent to injure competition.[11] For the reasons set forth on pages 8-13 of the Brief for the United States as amicus curiae in No. 77-689, petitioners' contention is without merit.

4. Petitioners also maintain (Pet. 26-27) that the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), precludes Sherman Act liability for their intentional anticompetitive price-squeeze tactics because I&M's retail rates were approved by state authorities. The foundation of petitioners' price-squeeze

---

[10] See Respondents' Br. in Opp. 15-16 n.10.

[11] Contrary to Petitioners' assertion (Pet. 25-26), the district court found, and the court of appeals agreed, that I&M's wholesale and retail rate alignments were motivated by a specific intent to injure competition (Pet. App. 20a-21a).

liability, however, was not the level of I&M's retail rates *simpliciter;* rather, liability was predicated on the anticompetitive effects caused by the *relationship* between I&M's retail and wholesale rates, coupled with petitioners' disregard of the Federal Power Act's mandate not to engage in discriminatory pricing. See *FPC* v. *Conway*, 426 U.S. 271 (1976) (Pet. App. 18a-22a; 57a-58a). No state authority either ordered or possessed authority to order petitioners to align I&M's wholesale and retail rates in a specified way, or to ignore the competitive implication of the relationship between wholesale and retail rates. As a result, the conflict between a clearly articulated state policy and federal antitrust policy which is a prerequisite for antitrust exemption under the state action doctrine is absent. See *Cantor* v. *Detroit Edison*, *supra*, 428 U.S. at 595-598; *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410-413 (1978); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 103-106.

5. A fair reading of the court of appeals' opinion refutes petitioners' attempt (Pet. 12) to characterize it as one of general applicability and importance to the electric utility industry. Neither lower court held that the filing of higher wholesale rates, while lower retail rates are likely to remain in effect, would by itself violate the Sherman Act. Rather, both courts indicated that a utility's failure to consider the competitive effects of the relationship between its wholesale and retail rates, or to justify that relationship on the basis of costs, constituted conduct which, together with other exclusionary practices, could be found to manifest a specific intent to monopolize (Pet. App. 21a, 77a). Here, the district court made find-

ings that I&M possessed monopoly power, and engaged in a course of exclusionary conduct (of which the price squeeze was part) that manifested a specific intent to monopolize. The court of appeals affirmed those factual findings. There is no need for this Court to consider anew these factual issues. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); see also *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Other courts surely will recognize that the court of appeals' decision rests on the facts of this particular case. Indeed, the very case which petitioners cite (Pet. Supp. Br. 1-4) to this Court as indicating a potential for conflict—*City of Groton* v. *Connecticut Light & Power Co.*, No. 15,609 (D. Conn. Aug. 26, 1980)—distinguished this case as resting on its facts (Pet. Supp. Br. 20SA-21SA) and concluded that it did not present any conflict. There is no reason to presume that other courts will be less perceptive.[12]

---

[12] The district court in this case found, and the court of appeals agreed, that respondents were compelled to incur litigating costs before the Federal Commission to combat threats that petitioners would curtail their supply of wholesale power (Pet. App. 32a, 59a). Those threats were elements of a course of conduct found to have violated the Sherman Act. The costs of litigating before the Federal Commission are injuries of the type the antitrust laws were intended to prevent, since the costs were necessary to preserve respondents' competitive viability. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). As the court of appeals explained, the litigating costs were forced upon respondents by petitioners' predatory tactics and were necessarily incurred in an attempt to save the source of their electric power: "the municipalities had no choice but to file an administrative action before the Commission to prevent the loss of their wholesale power source and to establish their right to equal treatment with the utility's retail customers whom the utility

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JEROME NELSON
Acting General Counsel

SANFORD M. LITVACK
Assistant Attorney General

JOHN A. CAMERON, JR.
Attorney
Federal Energy Regulatory Commission

BARRY GROSSMAN
BRUCE E. FEIN
Attorneys

DECEMBER 1980

---

had indicated would receive preferences" (Pet. App. 32a). The court of appeals thus properly held that these litigating costs were recoverable antitrust damages, in reliance on prior decisions establishing that litigation costs forced upon parties as an integral part of an antitrust violation are recoverable (*id.* at 31a). Nothing in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), suggests that litigating costs may not be treated as recoverable antitrust damages when the necessary nexus between the costs and an antitrust violation is proven. That case dealt solely with the question whether a prevailing party could be awarded attorneys' fees incurred in bringing the litigation in question, absent specific statutory allowance. It did not consider the allowance of attorneys' fees incurred in a different litigation forced upon the victim of a predatory scheme.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 334502 127